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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The City of Sacramento requires that developers of commercial properties pay a fee, as a condition to project approval, to fund low-income housing projects. Sacramento justifies this fee with the argument that new commercial buildings will facilitate new job opportunities which in turn will be filled by new workers who migrate to the community, some of whom will need low-cost housing.

1. When faced with a Takings Clause challenge to a city's housing fee exaction, did the Ninth Circuit err in holding, as a matter of law, that a legally sufficient nexus exists where there is a showing that commercial development is merely "related" to an increased need for low-income housing even though the city's study concludes that its "nexus analysis does not make the case that building construction is responsible for growth"?

2. Where a permit condition is challenged as a taking, does *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3, 841 (1987), require a greater degree of judicial scrutiny of the exaction and its alleged nexus to a proposed project than that afforded by the "rational basis" standard of review used by the Ninth Circuit?

3. Does the creation of new job opportunities through commercial development constitute an adverse impact upon a community that can justify imposing a mitigation fee on the builder to address the low-income housing needs of the community?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 941 F.2d 872 (1991), and is reproduced as Appendix (App.) A. Page references are to the version in the appendix. The unpublished decision of the United States District Court for the Eastern District of California is in the form of a signed judgment and is reproduced as Appendix B.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on August 7, 1991, and filed its order denying a petition for rehearing on January 7, 1992. Appendix C (order denying petition for rehearing). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND ORDINANCE PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part:

> "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment provides in part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The ordinance at issue is City of Sacramento Ordinance No. 89-013, adopted March 7, 1989. The text of the ordinance is reproduced as Appendix D.

STATEMENT OF THE CASE

A. Procedural History

This action was originally filed in the Superior Court of the State of California, County of Sacramento. As

originally filed, the action included a number of claims based on state law as well as the federal Constitution. Because of the presence of federal constitutional claims, the defendant, City of Sacramento (city), removed the action from state court to federal District Court pursuant to 28 U.S.C. § 1441.

Both parties moved for summary judgment on all claims and the matter was heard on September 8, 1989. At the conclusion of the hearing, the District Court granted the city's motion for summary judgment and denied plaintiff's cross motion. A judgment was filed November 15, 1989. App. B. This appeal was taken only as to the takings claim based on the federal Constitution.

After briefing and oral argument, the United States Court of Appeals for the Ninth Circuit on August 7, 1991, entered its decision upholding the District Court judgment. Judge Beezer wrote a dissent from the panel decision. Plaintiff's petition for rehearing with suggestion for rehearing *en banc* was denied on January 7, 1992.

B. The Case

This lawsuit challenges Ordinance No. 89-013, adopted by the City of Sacramento on March 7, 1989. The ordinance requires, as a condition to issuance of certain commercial-use building permits, that a fee be paid to the city.[1] App. D (Ordinance No. 89-013, Section III.D.(1)).

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[1] The amount of the fee is calculated on a per-square-foot basis and varies depending on the type of commercial project proposed. For example, office space is assessed a fee of $.95 per square foot whereas retail space is charged $.75 per square foot. The other categories of commercial-use projects identified in the ordinance are hotel, research and development, manufacturing, and warehouse. App. D-32.

The purpose of the fee is to finance a special fund (the Housing Trust Fund) to provide low-income housing units in the city. App. D-12.

It is well settled that exactions imposed as a condition to receiving a development permit can result in a regulatory taking in violation of the Fifth Amendment. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The takings test applied in *Nollan* was whether the permit condition " 'substantially advance[s] legitimate state interests.' " *Id.* at 834. Under this test, exactions are legitimate only if they mitigate a need or burden *caused by* the development project. *Id.* at 835-36; *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) (must have a "cause-and-effect relationship between the property use . . . and the social evil"). In the absence of a cause-and-effect relationship, or "essential nexus," the permit condition is not a legitimate regulatory action but a means of "extortion" which works a taking in violation of the Fifth Amendment. *Nollan*, 438 U.S. at 837.

The petitioner, Commercial Builders of Northern California (CBNC),[2] recognizes that providing low-income housing opportunities to needy people in Sacramento may be a legitimate and worthy objective for local government to pursue. However, CBNC contends that achieving this objective by raising money through building permit fees is an attempt to single out property

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[2] CBNC is an unincorporated association whose members are in the building profession or are owners and developers of real property intended to be developed for nonresidential uses in the City of Sacramento. Complaint at Paragraph 9.

owners to bear the costs of social programs. Petitioner argues that such cost shifting through an exaction of fees amounts to a leveraging of the permitting authority which violates Takings Clause principles as enunciated in *Nollan* and *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The city's theory for justifying the housing fee is that commercial-use projects, once built, will be occupied by businesses which will employ an estimated number of low-income wage earners. The city commissioned Keyser Marston Associates, Inc. (KMA), which produced a report estimating the number of low-income jobs typically located within various types of commercial and industrial development. App. E-3 through E-4. Since these jobs are new to the area, the assumption is that these opportunities will be filled by new low-income workers who migrate to the Sacramento region. App. E-5. Since the increased population of low-income workers will also need housing, the city claims that there is a "nexus" or "association" between commercial-use projects and an increased need for low-income housing. The city argues that this alleged nexus is sufficient to support the housing fee exaction.

The Ninth Circuit below stated that a permit condition may constitute a taking *"only* where the condition lacked *any rational relationship* to the project." App. A-4 (emphasis added). The court then upheld the fee by ruling that there was a "rational relationship" between commercial buildings and the city's need for low-cost housing. App. A-5. The court rejected petitioner's argument that the "substantially advance" standard of *Nollan* requires a closer nexus than a mere rational relationship.

"[W]e are not persuaded that *Nollan* materially changes the level of scrutiny we must apply." App. A-6. The Ninth Circuit further ruled that it was not necessary to show that commercial projects are directly responsible for the social ill that the exaction is designed to alleviate. App. A-7. Accordingly, even though builders do not cause people to be poor, and thus are not responsible for the economic condition which causes people to need low-cost housing, the court below nevertheless held that commercial builders may be singled out to pay a special fee to the city, as a housing subsidy, in order to be granted a permit to build on their property.

Judge Beezer dissented from the panel's decision. In his view, the city failed to establish the kind of cause and effect relationship required by this Court's precedents to justify a fee exaction. Judge Beezer characterized Sacramento's ordinance as "a transparent attempt to force commercial developers to underwrite social policy." App. A-11 (Beezer, J., dissenting). Beezer warned that "state and local governments have begun to stretch the use of exactions to the breaking point." *Id.* at App. A-13.

This case focuses on the need to set limits on how far the nexus rationale may be extended in requiring property owners to pay an increasingly burdensome array of permit fees. It also squarely presents the question of whether *Nollan*'s "substantial advancement" standard requires a closer degree of scrutiny of exaction schemes under the takings analysis than the rational basis review applicable in due process cases.

REASONS FOR GRANTING THE WRIT

I

THIS CASE INVOLVES IMPORTANT CONSTITUTIONAL QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT

A. The Precedent Established by the Decision Below Throws the Door Wide Open to a Whole Array of Creative New Development Fees to Address General Social Concerns

By employing only a rational basis test, the Ninth Circuit would allow Sacramento to condition building permits on payment of housing fees on the mere grounds that development is associated with a growing population. However, the fact that development occurs as the city's population increases does not mean that development causes population growth. *See* KMA report at App. E-9. Nevertheless, the decision below links commercial development to the housing needs of new residents. By so ruling, the decision below also links development to any and all kinds of other necessities and public services needed by a growing population. The ramifications of allowing such a broad connection were recognized by Judge Beezer in dissent.

> "[N]ew workers . . . will increase the demand for all manner of goods and services. If Sacramento has shown a sufficient causal connection in this case, we can be expected next to uphold exactions imposed on developers to subsidize small business retailers, child-care programs, food services and health care delivery systems." App. A-14 (Beezer, J., dissenting).

The panel decision swings the door wide open to a whole host of creative new developer fees since any new development can be "linked" to population increases in some manner. If this "nexus" is sufficient to allow government to require builders to pay fees for housing subsidies for new residents, builders can also be required to pay fees for all types of other public goods and services.

Before this Court allows a conclusion which singles out landowners for the cost of underwriting social programs on the basis that development is accompanied by population increases, this Court should carefully consider whether the City of Sacramento has indeed stretched "the use of exactions to the breaking point." App. A-13 (Beezer, J., dissenting).

These concerns are not hollow portends. Already, other examples of social program development fees are emerging. For example, Sacramento is now considering an ordinance to impose child care fees as a condition to development.[3] Los Angeles has recently adopted ordinances creating an Arts Development Fee and Trust Fund which requires developers to pay the city up to 1% of their building valuation as a condition of approval.[4] In Honolulu, Mayor Fasi has proposed requiring golf course developers to pay huge fees, reportedly $100 million, to support public low-income housing projects.[5] In

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[3] Steve Sebelius, *Developers Don't Want to Fix Social Ills*, Sacramento Union, Aug. 10, 1991, at A1, A8.

[4] City of Los Angeles Ordinance No. 166,724 and No. 166,725 enacted March 8, 1991.

[5] Bill Wood, *Politics in the Marketplace*, Hawaii Investor, Aug. 1991, at 39, 40.

San Diego, an initiative is being circulated that will require development fees to supplement the city police department in launching an anticrime campaign.[6] And Los Angeles politicians are carefully watching the final outcome of the case at bar. They are preparing to adopt a housing fee exaction modeled after Sacramento's ordinance, but the big difference is that Los Angeles proposes to charge office developments a housing fee upwards of $6.00 per square foot![7]

Perhaps the most dramatic indication of just how far the "nexus" rationale is being stretched is in the farming town of Greenfield, California. Located in Salinas Valley, this small town now requires residential developers to include two bicycles with each newly constructed house. The nexus?--new development is associated with increased air pollution and, of course, bicycle use reduces air pollution. *See Town Pledge: 2 Bikes in Every Home*, Sacramento Union, Feb. 20, 1992, at A5. The requirement has been imposed on at least two new development projects even though the Greenfield mayor admits: " 'I don't know whether they'll use the bikes or hock them and take the money and run. But at least we're doing something about this brown air in Salinas Valley.' " *Id.*

It is both comical and frightening to realize that government regulators can employ the nexus rationale to justify such a conclusion. It is also sobering to realize that

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[6] Lori Weisberg, *Plan Will Circulate Anti-Crime Initiative*, San Diego Union, Jan. 7, 1992, at B1.

[7] *Some Good, Some Bad Building Blocks in Mayor's Plan*, Downtown News, Aug. 26, 1991, at 4; Michael Berger, *Bradley Plan Would Pick Wrong Pockets*, L.A. Times, Aug. 18, 1991, at M5.

the link between houses and air pollution is probably more direct than the link between commercial development and the low-income housing needs of workers who may or may not be employed within commercial buildings. The precedent below does indeed stretch the nexus analysis *beyond* the breaking point.

People will always need a place to live. If constructing a building is accepted as a sufficient nexus to impose responsibility on the builder to also provide housing subsidies for workers within those buildings, then how far can the analysis go before it stops? What social programs are not more or less linked to population growth which, in turn, may be associated with commercial and residential development? The decision below sets a far-reaching and dangerous precedent by allowing permits to be held hostage until the applicant agrees to fund some social objective unrelated to the direct or substantial consequences of the proposed project.

B. The Question of How Far Development Fees Can Reach in Addressing Social Concerns Is a Question of Great Importance Nationwide Which Should Be Answered by This Court

One indicator of the national significance of the decision below is the widespread media coverage which the decision has generated. Coverage includes national newspapers,[8]

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[8] *Fee Fever*, Wall St. J., Sept. 16, 1991; Stephen Chapman, *A City Pays for Social Programs by Fleecing Newcomers*, Chi. Trib., Oct. 13, 1991, at 3; Henry Weinstein, *Court OKs Fee on Builders to Pay for Housing*, L.A. Times, Aug. 8, 1991, at A1; Michael Berger, *Bradley Plan Would Pick Wrong Pockets*, (continued)

trade journals,[9] legal newspapers,[10] and local newspapers from around the country.[11]

The national significance is more than just media hype. In its recent report to President Bush and Secretary

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L.A. Times, Aug. 18, 1991, at M5; Lynn Ludlow, *Developers' Low-Cost Housing Fee Survives Appellate Court Threat*, S.F. Examiner, Aug. 8, 1991; Cooper and Delsohn, *Court OKs Making Developers Aid Low-Income Housing*, Oakland Trib., Aug. 8, 1991; *Fees on Developers Upheld but Sacramento Housing Case Expected To Be Appealed*, Honolulu Star-Bulletin & Advertiser, Aug. 25, 1991, at A35.

[9] Pete Barlas, *Guess Who Pays for Growth, Court Ruling Rocks Industry*, Cal. Real Estate J., Sept. 15, 1991, Vol. 1, No. 13, at 1; Mike Silva, *High Fees for Low Income*, Real Estate Week, Western Edition, July 9, 1990, at 1; *Cal. Land Use Law & Policy Reporter*, Oct. 1991, at 35; Sigfredo Cabrera, *Federal Appeals Court Upholds Developer Fees for Low Income Housing*, BIA Builder, Oct. 1991, at 25.

[10] Michael Berger, *Developers Get Treated Like Fish in a Barrel*, L.A. Daily J., Aug. 29, 1991, at 5; Philip Carrizosa, *Developers Must Pay for Low-Income Housing*, S.F. Banner Daily J., Aug. 8, 1991, at 1; *also printed in* L.A. Daily J., Aug. 8, 1991, at 1.

[11] Bruce Lee, *Housing Trust Fund a Dangerous Form of Taxation*, Sacramento Union, Aug. 16, 1991; Steven Chapman, *When City Fees Become Matter of Extortion*, Colorado Springs Gazette Telegraph, Oct. 19, 1991; *also printed in* La Habra Daily Star Progress, Oct. 17, 1991, *and* San Clemente Sun Post, Oct. 14, 1991; *Mistrustful Funding*, Turlock J., Aug. 19, 1991; *Another Tax on Jobs*, Woodland Hills Daily News, Aug. 16, 1991; *Unreal Estate*, Orange County Register, Aug. 13, 1991; *Low-Income Housing Gets Legal Boost*, San Jose Mercury-News, Aug. 8, 1991, at 5B; *New Builder Fees Threaten Property Rights*, Acton/Agua Dulce News, July 15, 1991, at 2; Philip Carrizosa, *Circuit Panel Upholds Developers Fee*, Santa Rosa Herald Recorder, Aug. 27, 1991.

Kemp, the Advisory Commission on Regulatory Barriers to Affordable Housing identifies the problems presented to affordable housing by increasingly large development fees. *See "Not in My Backyard," Removing Barriers to Affordable Housing*, Executive Summary at 3. The Commission recommends that impact fees be used only to fund facilities that "directly serve" or are "directly connected" to the proposed development. Executive Summary at 13, Recommendation 7-10.

It is ironic that Sacramento's goal of improving the city's supply of low-cost housing has resulted in legal precedent which, if allowed to stand, opens the door to even more fees, including fees on residential development, thus ultimately making the goal of affordable housing even more difficult to achieve.

The significance of the precedent below is also reflected by its impact on the democratic process. The precedent authorizes a shift toward using development fees to achieve wealth transfers that otherwise could not withstand the public scrutiny and accountability of paying for such transfers through taxes. By compelling wealth transfers "off budget" with relative invisibility, the normal democratic process is circumvented and thereby undermined. *Pennell v. City of San Jose*, 485 U.S. at 21 (Scalia, J., dissenting). Of course, achieving such wealth transfers through means other than taxes should not be permitted. As Judge Beezer explained, Sacramento "legislators find it politically more palatable to exact payments from developers than to tax their constituents. The Takings Clause prohibits singling out developers to bear this burden." App. A-11 (Beezer, J., dissenting).

C. The Precedent Established by the Decision Below Conflicts with Applicable Decisions of This Court

1. The Ninth Circuit Has Sanctioned a Nexus Standard Which Disregards the Necessary Cause-and-Effect Relationship Required to Impose Permit Conditions

This was an appeal from a grant of summary judgment. The Ninth Circuit only needed to determine whether there was a triable issue of material fact. In concluding that there was no triable issue of fact the Ninth Circuit has ruled, as a matter of law, that the nexus analysis employed here was adequate to satisfy constitutional standards.

However, the nexus approved of by the Ninth Circuit is one which utterly fails to establish a cause-and-effect relationship between proposed projects and the public harm which the permit condition is designed to alleviate. Indeed, the nexus analysis conducted by Keyser Marston Associates, Inc., did not even attempt to establish that commercial development causes a migration of low-income workers to Sacramento. Rather, the so-called nexus analysis contained in the report is nothing more than an estimate, on a per square foot basis, of the number of low-income workers that typically are employed in various types of commercial and industrial buildings. *See* KMA report at App. E-3 through E-4 (chart summarizing numerical data).

The report even admits that it does not establish a cause-and-effect relationship. Under the heading "Responsibility for Growth," the report acknowledges:

> *"The nexus analysis does not make the case that building construction is responsible for growth.* Clearly many factors come into play in determining what makes a region grow. At best, it can be said that the production of buildings to accommodate growth is but one of many factors that enable or contribute to its occurrence." App. E-9 (emphasis added).

The report further concedes that there are *"major questions and issues* about accounting for the growth of very low-income households in a growing economy." App. E-3 (emphasis added).

The Ninth Circuit nevertheless upheld summary judgment and did so despite a declaration submitted in opposition to the city's motion for summary judgment which showed that instead of commercial construction causing an influx of workers, the exact opposite occurs, *i.e.*, employers follow the work force. App. F-3 (Declaration of David Wade). In reaching its conclusion, the Ninth Circuit necessarily adopted, as a matter of law, the view that a sufficient nexus exists between commercial buildings and low-income housing needs even though there is no showing of a cause-and-effect relation between those occurrences.

The court appeared to try to soften the unfairness of its decision by suggesting the Sacramento ordinance "accounts for the indirectness of the connection" by charging developers "only a small percentage" of the total low-income housing needs in the city. App. A-10.

But if only a minor and indirect nexus exists, as the court's reasoning appears to concede, *then no exaction at all can be justified. Nollan* requires that there be a *substantial connection* between the project and the identified public problem. At best, the rationale of the court below, while attempting to demonstrate that some small fee may be charged, actually demonstrates that the connection in this case is not sufficient at all to justify placing this condition on permit applicants.

2. As a Matter of Law, Commercial Builders Are Not Responsible for the Economic Well-Being of People Who Work in Buildings They Construct and, Therefore, Builders Cannot Be Singled Out to Pay a Special Burden to Provide a Public Housing Subsidy

As a matter of law, commercial builders should not be held legally responsible, through building permit exactions, for the housing needs of the city's populace. Even if one assumes, arguendo, that commercial development is, to some degree, a factor in attracting low-income workers to the Sacramento area, this linkage is too remote and indirect to justify imposition of this fee. To impose a fee, there must be an *element of responsibility* that arises because of a substantial cause-and-effect relationship. But commercial-use buildings are not the cause of Sacramento's need for low-income housing. Rather, the need for low-income housing occurs because some people are poor. But commercial developers do not cause people to be poor.

Although the majority in *Pennell* found the takings claim not ripe (and therefore did not reach the merits of

that claim), Justices Scalia and O'Connor dissented on the ripeness issue and went forward to address the merits of the takings claim. The reasoning of the dissent, which was not controverted by the majority, explained why property owners are not responsible for the economic hardships and housing concerns of the working poor.

> "[T]he 'hardship' provision, is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But *that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, *or the employers who pay them their wages*, or the citizens of San Jose holding the higher paying jobs from which they are excluded. *Pennell*, 485 U.S. at 21 (Scalia, J., dissenting) (emphasis in original; emphasis added).

Similarly, commercial builders are not responsible for the problem of workers who cannot afford market rate housing. That problem must be addressed by the city through means other than special development fees on commercial projects.

> "The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes . . . . Unless we are to abandon the guiding principle of the Takings Clause that 'public burdens . . . should be borne by the public as a whole,' this is the only manner that our Constitution permits." *Id.* at 21-22 (citations omitted).

The present case is no different. Just as the landlords in *Pennell* are not responsible for the economic conditions of their particular tenants, similarly, commercial builders are not responsible for the economic condition of workers who will occupy those buildings.

If it is to mean anything at all, the nexus concept must include an element of responsibility similar to the "duty" concept (sometimes referred to as proximate cause) applied in tort law. Just as liability in tort law may be cut off for consequences that are too remote or indirect, similarly, builders should not be held liable for public needs which are only remotely or indirectly connected to projects. The "substantially advance" test of *Nollan*, as well as the "fairness and justice" principles underlying the Takings Clause (*see Armstrong*, 364 U.S. at 49), provide ample authority. By using a mere rational relationship type of test, the Ninth Circuit removes the element of responsibility which must be present in order to require a property owner to solve a public problem.[12]

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[12] It should be noted that requiring a substantial cause-and-effect relationship does not invalidate traditional subdivision conditions. Judge Beezer explained that traditional on-site improvements (*e.g.*, sewers, water mains, sidewalks, curbs, and gutters) as well as off-site improvements (*e.g.*, roads, schools, parks, and sewage treatment plants), are generally upheld. In those cases, the requirement "solves a problem actually created by the development." App. A-12 (Beezer, J., dissenting). The Sacramento ordinance is further distinguished by the fact that the housing fee does not directly benefit or service the development.

> "Sacramento would have developers pay not just for public improvements necessitated by development, but for private subsidies with little or no causal connection to development. *Not surprisingly, under a scheme requiring no connection, no benefit accrues to the development in return.*" *Id.* at A-13 (emphasis added).

II

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER STATE AND FEDERAL COURTS, REGARDING THE DEGREE OF SCRUTINY IN TAKINGS/EXACTION CASES

A. The Ninth Circuit Ruling Conflicts with Precedent Set by This Court in Nollan

In *Nollan* this Court ruled that the takings analysis involves a greater degree of judicial scrutiny than is applicable in due process and equal protection challenges. The Court pointed out that under the takings analysis a regulation must " 'substantially advance' the 'legitimate state interest[s],' " rather than be rationally related to those interests. *Nollan*, 483 U.S. at 834 n.3. This Court further emphasized that the abridgement of property rights requires a " '*substantial* advanc[ing]' " (*id.* at 841, emphasis by the Court) and that the Court is "inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Id.* at 841.

Legal commentators have recognized that this aspect of *Nollan* is perhaps its greatest significance.[13] Yet, the

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[13] *See, e.g.*, Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 Neb. L. Rev. 186, 210 (1991) ("[i]t was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with (continued)

decision below relies on pre-*Nollan* and other inapplicable cases to support a view that a permit condition challenged under the Takings Clause need only satisfy rational basis review. The court expressly rejected petitioner's contention that *Nollan*'s substantial advancement standard requires a closer degree of scrutiny. "We are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to the Ordinance." App. A-6. But the Ninth Circuit's conclusion is directly contrary and irreconcilable with the express language of this Court in *Nollan*.

B. The Decision Below Conflicts with Interpretations of Nollan by Both Federal and State Courts

The Ninth Circuit's application of a rational basis standard of review is directly contrary to interpretations of *Nollan* provided by New York and California courts. *See Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (N.Y. 1989) (challenges of this sort require " 'semi-strict or heightened judicial scrutiny of regulatory means-ends relationships' as articulated in *Nollan*"); *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d

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a takings analysis . . . that marks the importance of the *Nollan* case"); Robert K. Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions*, 10 Zoning & Planning L. Report 152, 156 (Oct. 1987); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. Colo. L. Rev. 599, 613 (1991); Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 338 (1988); *The Supreme Court 1986 Term: Leading Cases*, 101 Harv. L. Rev. 119, 247-49 (1987).

1260, 1270 (1991) ("*Nollan*, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as a 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls") (emphasis in original; footnotes omitted).

The decision below also conflicts with other Federal Circuit Court opinions. In contrast to the rational basis test applied by the court below, a different panel from the same circuit has more recently recognized that *Nollan* does require a "close analysis" in takings cases. *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582-83 (9th Cir. 1991) ("relationship between the means and the ends must be closer for purposes of takings clause analysis" than due process analysis; "[w]e interpret *Nollan* as holding that in cases brought under the takings clause we must undertake a close analysis of the means of protecting the asserted governmental interest").[14]

In short, the decision below places itself directly at odds with the clear language of *Nollan* and with judicial interpretations of *Nollan*. Unfortunately, this split of authority will create substantial confusion for lower courts. Indeed, the case at bar is already having just such

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[14] The First Circuit, although not reaching the issue, has also recognized that *Nollan*'s takings analysis may be different from the rational basis review applicable in due process cases. *Tenoco Oil Co., Inc. v. Department of Consumer Affairs*, 876 F.2d 1013, 1020-21 (1st Cir. 1989). *See also McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989) (recognizes *Nollan* as applying strict scrutiny); *Boone v. United States*, 725 F. Supp. 1509, 1523 (D. Haw. 1989) (*Nollan* "puts an increased burden on the Corps to justify its actions").

an impact. In *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992), the California Court of Appeal was confronted with, on one hand, the decision of its sister Court of Appeal in *Surfside Colony* (where *Nollan* was interpreted as requiring a heightened level of scrutiny) and, on the other hand, with the case at bar (where heightened scrutiny was rejected). In an apparent effort to reconcile the conflict, the *Blue Jeans Equities* court ends up holding that "any heightened scrutiny test contained in *Nollan* is limited to *possessory* rather than regulatory takings cases." *Id.* at 171 (emphasis added).

Of course, in a possessory taking case *no scrutiny at all* is required. Such cases are per se takings. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Moreover, *Nollan* was not a possessory taking case but was a regulatory taking case which analyzed whether the government's regulation, in the form of a permit condition, violated the regulatory takings test set forth in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (land use regulation effects a taking if it fails to substantially advance legitimate state interests). To rule that *Nollan* establishes heightened scrutiny in *possessory* takings cases makes no sense at all.

The *Blue Jeans Equities* opinion illustrates that the decision below will produce ever more confusing decisions which can only lead to strained and incorrect interpretations of this Court's takings jurisprudence.

C. The Heightened Scrutiny Issue Is an Important Question of Law Which Should Be Resolved by This Court

Applying the correct degree of scrutiny is critical to the ability of lower courts to properly conduct a takings determination. Indeed, the level of scrutiny is the key factor in determining whether the Takings Clause provides protection to property owners from government exaction schemes. This is aptly illustrated by the decision below where application of a rational basis level of review easily led to a decision upholding the fee exaction even though the alleged nexus, at best, is tenuous and speculative. Any close examination of the substance of the Keyser Marsten report bears out that a cause and effect nexus does not exist.

This Court in *Nollan* characterized the coastal commission's abuse of its permitting authority as extortion and a leveraging of the police power. *Nollan*, 483 U.S. at 837. How are courts to ferret out such abuses of the permitting authority if they do not look closely at the *substance* underlying government action? The present case, like *Nollan*, illustrates the need for some form of heightened scrutiny. Resolving the split of authority concerning the appropriate degree of scrutiny under the Takings Clause is of exceptional importance and merits review by this Court.

III

THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY WITH STATE COURTS OF LAST RESORT REGARDING RESPONSIBILITY FOR LOW-INCOME HOUSING

The decision below is directly contrary to decisions of the highest courts of Washington and New York. *See Seawall Associates v. City of New York*, 542 N.E.2d 1059, and *San Telmo Associates v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (Wash. 1987). Those cases recognize that a low-income housing shortage is a social problem which cannot be addressed by shifting the costs onto the backs of those who wish to develop their properties. The New York court specifically recognizes that the nexus between development and the social problem of housing low-income people is too indirect and tenuous to justify imposing a housing fee on developers. *Seawall Associates*, 542 N.E.2d at 1062. The direct conflict presented by these holdings on such a significant issue should be resolved by this Court.

At issue in *San Telmo* was a Seattle ordinance which conditioned demolition of low-income residential units on payment of a fee to help finance a city housing fund. The city argued that the fee requirement was "merely a regulation on development." *See San Telmo*, 735 P.2d at 674. The Washington Supreme Court responded:

> "Quite simply, the municipal body cannot shift the social costs of development on to a developer under the guise of a regulation.
>
> . . . .
>
> "We sympathize with the problem created by the low income housing shortage in the city

> of Seattle. However, the City must cure this problem by the lawful exercise of powers granted to it by the constitution and the Legislature. The City can ameliorate this housing shortage by legitimate rezones or, as it has recently done, by passing a multimillion dollar levy on all property owners in Seattle. Nevertheless, the City may not constitutionally pass on social costs of development of the downtown Seattle area to current owners of low income housing. The problem must be shared by the entire city, and those who plan to develop their property from low income housing to other uses cannot be penalized by being required to provide more housing." *Id.* at 675.

The case in New York is also strikingly parallel to the one here. The attempt in New York, like Seattle, was to impose a special burden on property owners in the form of a buy-out fee as a condition to converting single-room occupancy [SRO] dwellings to another use. The purpose of the fee was to provide housing for the homeless. After carefully analyzing this Court's precedent, including *Nollan*, the New York court concluded that the takings issue there, "as in any case," was whether the individual property owners were being forced "to bear more than a just share of obligations which are rightfully those of society at large." *Seawall Associates v. City of New York*, 542 N.E.2d at 1062. The court held:

> "[T]he nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property

owners to bear the costs required by the law toward the cure of the homeless problem. Indeed, by equating the 'cure' with dollars . . . the terms of Local Law No. 9 itself demonstrate that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole." *Id.* at 1069.

CONCLUSION

Sacramento's ordinance is intended to transfer wealth from those who desire to develop commercial properties to those who have below average incomes. But providing economic assistance to the needy is a responsibility of society as a whole. Property owners who desire legitimate use of their lands—reasonable and beneficial uses which meet all standards for approval—should not be singled out to finance the costs of providing housing for the needy. They do not cause people to be poor, nor are the economic hardships a consequence of their desire to develop their properties.

In upholding Sacramento's scheme, the Ninth Circuit has overlooked the very purpose of the Takings Clause. That purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 227 (1986); *Nollan*, 483 U.S. at 835 n.4. This case falls squarely within this guiding principle which has been referred to by this Court as "axiomatic." *First English Evangelical Lutheran Church of*

Glendale v. County of Los Angeles, 482 U.S. 304, 318-19 (1987). Yet, the Ninth Circuit ignored it completely.

This oversight of the essential purpose of the Takings Clause, especially when combined with application of a mere rational basis standard of review, is the real vice of the decision below. The result is to uphold a fee exaction which, as Judge Beezer recognized, is really an attempt to saddle property owners with a community burden.

This case has been closely watched by property owners and builders who are already heavily burdened with an array of permit conditions and fee exactions. The precedent now established stretches the exaction rationale "to the breaking point." App. A-13 (Beezer, J., dissenting). The extent to which builders can be subjected to creative new fees for social programs is an issue of exceptional importance and wide-ranging impact.

The petition should also be granted to resolve the split of authority regarding the applicable level of scrutiny in takings/exaction cases. Without further guidance from this Court, the conflicting authorities will lead to still further confusion and inconsistent results.

Petitioners respectfully urge this Court to grant the petition for writ of certiorari.

DATED: March, 1992.

Respectfully submitted,

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APPENDIX A*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members, *Plaintiffs-Appellants,* v. CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, *Defendants-Appellees.*	No. 89-16398 D.C. No. CV-S-89-638-EJG OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
March 12, 1991 – San Francisco, California

Filed August 7, 1991

Before: Mary M. Schroeder, Robert R. Beezer and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Schroeder; Dissent by Judge Beezer

OPINION

SCHROEDER, Circuit Judge:

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* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

INTRODUCTION

Commercial Builders appeals the district court's grant of summary judgment in favor of the City of Sacramento in Commercial Builders' suit challenging a city ordinance to help expand available low income housing. The Ordinance in question conditions certain types of nonresidential building permits upon the payment of a fee intended to offset the burdens on the city caused by low-income workers who move there to fill jobs created by the project in question. Appellants are a group of commercial developers who filed suit contending the ordinance constitutes a taking under the fifth and fourteenth amendments.

The district court granted summary judgment in favor of the city, holding that the Ordinance did not effect an unconstitutional taking. It specifically found that the Ordinance substantially advanced a legitimate interest and that the city had adequately supported its contribution requirement by showing a sufficient nexus between nonresidential development and the demand for low-income housing. The court therefore concluded that the ordinance was not infirm under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which requires such a nexus between land use restrictions and the articulated purpose behind them. Because we agree that the Ordinance here at issue does not amount to an unconstitutional taking, we affirm.

DISCUSSION

In 1987, the City and County of Sacramento commissioned a consulting firm, Keyser-Marston Associates, to

study the need for low-income housing, the effect of nonresidential development on the demand for such housing, and the appropriateness of exacting fees in conjunction with such development to pay for such housing. Keyser-Marston submitted its report, estimating the percentage of new workers in the developments that would qualify as low-income workers and would require housing. As instructed, it also calculated fees for development based on a yearly subsidy of $12,000 per qualified household that would be connected to the development. This figure represented the difference between $42,000, the minimum cost of building a two-bedroom apartment, and $30,000, the maximum rental income expected from a low-income household. Also as instructed, however, in the interest of erring on the side of conservatism in exacting the fees, it reduced its final calculations by about one-half.

Based upon this study, the City of Sacramento enacted the Housing Trust Fund Ordinance on March 7, 1989. The Ordinance list several city-wide findings, including the finding that nonresidential development is "a major factor in attracting new employees to the region" and that the influx of new employees "create[s] a need for additional housing in the City." Pursuant to these findings, the Ordinance imposes a fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs. The fees, calculated using the Keyser-Marston formula, are to be paid into a fund to assist in the financing of low-income housing. The city projects that the fund will raise about $3.6 million annually, nine percent of the projected annual cost of $42 million for the needed housing. Additional

money will come from other sources, such as debt funding and general revenues.

Commercial Builders does not argue that the city lacks a legitimate interest in expanding low-income housing. Rather, it contends that this Ordinance constitutes an impermissible means to advance that interest, because it places a burden of paying for low-income housing on nonresidential development without a sufficient showing that nonresidential development contributes to the need for low-income housing in proportion to that burden. We affirm because we find the Ordinance sufficiently related to the legitimate purpose it seeks to achieve.

We have held that a condition placed upon the granting of a permit to develop land may constitute an impermissible taking, but we have done so only where the condition lacked any rational relationship to the project for which the permit was sought. In *Parks v. Watson,* 716 F.2d 646 (9th Cir. 1983), we held that where a developer seeking vacation of platted streets offered to pay for such vacation, a city could not insist that the developer dedicate its geothermal wells to the city as a precondition for such vacation. The dedication requirement, we held, "had no rational relationship to any purpose related to the vacation of the platted streets." 716 F.2d at 653. The condition therefore violated the fifth amendment.

We noted in *Parks* that the analysis we applied was based upon a consensus among the states that had considered the constitutionality of subdivision exaction regulations. 716 F.2d at 653. Prior to *Nollan,* other federal courts similarly upheld ordinances placing restrictions or conditions upon development where the ordinances were

reasonably related to legitimate public purposes. *See, e.g., Rogin v. Bensalem Township*, 616 F.2d 680, 690-92 (3d Cir. 1980), *cert. denied sub nom. Mark-Garner Associates v. Bensalem Township*, 450 U.S. 1029 (1981); *Maher v. City of New Orleans*, 516 F.2d 1051, 1064-67, *reh'g denied*, 521 F.2d 815 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); *Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1031-32 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979). Under this analysis, the Ordinance here at issue cannot be said to work an unconstitutional taking. It was enacted after a careful study revealed the amount of low-income housing that would likely become necessary as a direct result of the influx of workers that would be associated with the new nonresidential development. It assesses only a small portion of a conservative estimate of the cost of such additional housing. The burden assessed against the developers thus bears a rational relationship to a public cost closely associated with such development.

The appellants contend that, even if the Ordinance would pass constitutional muster under these principles, it must be struck down because the Supreme Court has now articulated a more stringent standard under which courts must analyze the imposition of conditions upon development. The appellants point out that in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Court held that such conditions must not only be ones that the government might "rationally have decided" to employ for a given legitimate public purpose; they must also substantially advance such a purpose. *See* 483 U.S. at 834 & n.4. They argue that under the standard articulated in

Nollan, an ordinance that imposes an exaction on developers can be upheld only if it can be shown that the development in question is directly responsible for the social ill that the exaction is designed to alleviate.

As a threshold matter, we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance. The *Nollan* Court specifically stated that it did not have to decide "how close a 'fit' between the condition and the burden is required," because it found that the regulation in question "d[id] not meet even the most untailored standards." 483 U.S. at 838. It also noted that its holding was "consistent with the approach taken by every other court that has considered the question," citing *Parks* as the lead case in its string cite. *Id.* at 839. Other circuits that have considered the constitutionality of ordinances that placed burdens on land use after *Nollan*. None have interpreted that case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land. *See, e.g., St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 357 n.6 (2d Cir. 1990), *cert. denied sub nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector*, 111 S. Ct. 1103 (1991); *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 737 (5th Cir. 1988); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 178 (4th Cir. 1988). In keeping with this generally accepted view, we have recently reversed a district court's invalidation, under *Nollan*, of a requirement that a developer undertake off-site measures to mitigate harm to the environment, finding that that court had inappropriately required too close a nexus between the regulation and the interest at stake. *Leroy Land*

Development v. Tahoe Regional Planning Agency, No. 90-15364 (9th Cir. July ___, 1991), *rev'g Leroy Land Development Corp. v. Tahoe Regional Planning Agency*, 733 F. Supp. 1399 (D. Nev. 1990). We see no reason to depart from this view in this case.

We therefore agree with the City that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld. Where, as here, the Ordinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed, the Ordinance does not suffer from the infirmities that the Supreme Court disapproved in *Nollan*. We find that the nexus between the fee provision here at issue, designed to further the city's legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster.

The appellants also place some significance on the fact that this Ordinance is a fee provision. They contend that the fee represents a transfer of property, i.e., the money paid over to the city. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (treating a purely financial exaction as a taking). In this respect, they argue, it more closely resembles a physical taking of property, which automatically falls within the purview of the fifth amendment, than a land use regulation, which is subject to a reasonableness analysis. Under appellants' theory, however, compensation would be required for

every fee; therefore, every fee would be unconstitutional. We see no valid basis for such a rule.

Indeed, the only circuit court to treat a fee provision as an unconstitutional taking under *Nollan* was ultimately reversed by the Supreme Court. In *Sperry Corp. v. United States*, 853 F.2d 904 (Fed. Cir. 1988), the Federal Circuit found unconstitutional a government exaction of a percentage of any award from the Iran Claims Commission. It treated the fee as a physical taking because it constituted a transfer of the possession of property. 853 F.2d at 906-07. It then invalidated it because it found the exaction arbitrary. *Id.* at 908. The infirmity, the court held, was the assessment of the cost of the Iran hostage crisis only against those who successfully asserted claims associated with Iranian interests. Because that crisis was a national concern, the court concluded, the burden should instead have been borne equally by the whole nation. *Id.*

The Supreme Court disagreed, holding that the exaction of a percentage of any award made by the Iran Claims Commission was a permissible means of collecting reimbursement for costs incurred in the operation of that Commission. *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989). The Court expressed doubts as to the appropriateness of the Federal Circuit's analysis of the fee under principles applicable to physical takings, noting that "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." 110 S. Ct. at 395 n.9. Under this reasoning, the Ordinance does not, as appellants suggest, constitute a taking per se.

In *Webb's Fabulous Pharmacies*, 449 U.S. 155, upon which these appellants have also relied, the Court struck down a Florida statute that confiscated all interest on interpleader funds deposited with the state courts. The Court there reasoned that the statute in question served no purpose, because another Florida statute required that parties make payments for the services rendered by court personnel in maintaining such funds. 449 U.S. at 163-64. The appellants argue in this case that the Ordinance here at issue is similarly unrelated to a permissible purpose, contending that the mere desire to generate revenue for the public good cannot, after *Webb's Fabulous Pharmacies*, support the exaction.

The *Sperry* Court disposed of a similar argument. Its decision to uphold the deduction from awards was primarily based on the fact that the fee was used to pay for the operations of the tribunal that resolved the disputes of all of those from whom such a fee was collected; thus, a close nexus between the charge and the activity creating the cost was established. The Court indicated, however, that it would have been satisfied with an even looser nexus, stating that "Sperry may be required to pay a charge for the availability of the Tribunal even if it never actually used the Tribunal." 110 S. Ct. at 395-96. A purely financial exaction, then, will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed. Again, we conclude that the required nexus is present in this case.

Finally, the appellants contend that, regardless of the standard to be applied in assessing the validity of the Ordinance, they have raised an issue of material fact in

their attack on the conclusions of the Keyser-Marston study. This attack came in the form of an affidavit from their planner, David Wade, suggesting that commercial development may be a less decisive factor in worker migration than the Keyser-Marston study indicates. Wade concluded that, in addition to employment opportunity, the availability of low-income housing is itself partly responsible for any influx of low-income employees to Sacramento. Wade also opined that it is at least as true that employers follow the work force as the converse. This affidavit, appellants argue, sufficiently calls into question the city's findings concerning the nexus between its Ordinance and the social ill it sought to cure to preclude summary judgment.

The appellants' argument lacks merit. Even viewing the Wade affidavit in the light most favorable to the developers, it does not rebut the Keyser-Marston conclusion that commercial development is related to an increase in the need for low-income housing. The Ordinance accounts for what the developers characterize as the indirectness of the connection between the creation of new jobs and the need for low-income housing by charging only a small percentage of what the Keyser-Marston study calculated to be the cost of meeting new low-income housing requirements. As we have already noted, nothing in *Nollan* or any other authority cited by the appellants requires the nexus to be more direct than that achieved through the legislative process that the city here employed. We therefore agree with the district court that the Wade affidavit is insufficient to preclude summary judgment.

CONCLUSION

The district court correctly found that, as a matter of law. Sacramento's Housing Trust Fund Ordinance does not work an unconstitutional taking. Summary judgment in favor of the city was therefore proper.

AFFIRMED.

BEEZER, Circuit Judge, dissenting:

I respectfully dissent.

As Justice Scalia warned in *Nollan*, a state can leverage its police power to the point where a regulation of land use becomes an "out-and-out plan of extortion." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). Sacramento's ordinance is a transparent attempt to force commercial developers to underwrite social policy. Apparently, legislators find it politically more palatable to exact payments from developers than to tax their constituents. The Takings Clause prohibits singling out developers to bear this burden.

Historically, courts have upheld exactions when states were able to justify them as serving a public purpose related to the burdens caused by development.[1] For example, courts have sustained requirements that developers construct various on-site improvements, such as sewers, watermains, sidewalks, curbs and gutters, storm

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[1] *See generally* Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 Law & Contemp. Probs. 5 (Winter 1987).

drains, and landscaping. Requiring off-site improvements that serve a public purpose, such as roads, schools, parks and sewage treatment plants, may also be justified where the requirement alleviates a public burden or ameliorates harmful effects caused by the development. When the developer is asked to bear a fair share of the burden, such a requirement directly furthers the legitimate interests of the government. *See, e.g., Leroy Land Development v. TRPA,* No. 90-15364, slip op. at 8520 (9th Cir. July 9, 1991). When the governmental exaction solves a problem actually created by the development (for example, requiring the developer to provide needed infrastructure), it is no coincidence that the exaction results in a benefit to the development as well as the community.[2]

State and local governments face mounting budget deficits, attributable to decreased federal funding, recessionary pressures on tax collection and the growing popularity of "taxpayer revolts" – the most well-known example of which is California's Proposition 13.[3] In

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[2] *See, e.g., Hollywood Inc. v. Broward County,* 431 So.2d 606 (Fla. Dist. Ct. App.), *cert. denied,* 440 So.2d 352 (1983). Upholding a county ordinance requiring the dedication of land or payment of a fee to assist the county in acquiring and developing parks, the court noted that (1) the funds had to be expended within a reasonable time, (2) the funds had to be used to meet the need created by the development, and (3) the park system thereby provided would "substantially benefit the residents of the platted area." *Id.* at 612.

[3] Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices,* 50 Law & Contemp. Probs. 51, 51-52 (Winter 1987); Blaesser & Kentopp, *Impact Fees: The "Second Generation,"* 38 Wash. U.J. Urb. & Contemp. L. 55, 59 (1990).

response, state and local governments have begun to stretch the use of exactions to the breaking point.[4] Sacramento would have developers pay not just for public improvements necessitated by development, but for private subsidies with little or no causal connection to development. Not surprisingly, under a scheme requiring no connection, no benefit accrues to the development in return.

> It is no longer the case that exaction requirements are imposed only when the direct benefit to the land and extra costs to government created by development are demonstrable. Instead, exaction fees have approached . . . "grand theft," as the benefit to private landowners has become marginal, or in some cases, nonexistent, and the public need attributable to new development more tenuous and theoretical.

Smith, supra note 1, at 29 (footnotes omitted).

Sacramento has commissioned a study that demonstrates at best a tenuous and theoretical connection between commercial development and housing needs. But the Takings Clause requires a cause-and-effect relationship between the two. *Pennell v. San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting). In my view, Sacramento has not shown such a relationship. Even the study relied on by the city to support the ordinance states that its "nexus analysis does not make the case that building construction is responsible for growth."

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[4] Honolulu is considering an ordinance that would impose a similar low-income housing fee on golf-course developers. Cabrera, *Taxman, Spare That Golf Course*, Wall St. J., July 11, 1991, at A10, col. 3.

The ordinance is nothing more than a convenient way to fund a system of transfer payments. Although Sacramento attempts to justify the ordinance as an exercise of its police power, the city actually is exercising its taxing power – free of the encumbrances generally thought to limit the exercise of that power.

> The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities – a problem caused by the society at large – has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," this is the only manner that our Constitution permits.

Pennell, 485 U.S. at 21-22 (Scalia, J., dissenting) (citation omitted).

The new workers attracted by the new jobs associated with the new development surely will increase the demand for all manner of goods and services. If Sacramento has shown a sufficient causal connection in this case, we can be expected next to uphold exactions imposed on developers to subsidize small business retailers, child-care programs, food services and health-care delivery systems.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, AND ITS AFFECTED MEMBERS,

Plaintiffs and Petitioners,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20, inclusive,

Defendants and Respondents.

_____/

CIV. NO. S-89-638 EJG

JUDGMENT

(Filed Nov. 15, 1989)

This matter was before the court on September 8, 1989 for hearing on the parties' cross-motions for summary judgment on all causes of action. Joel S. Levy and Howard S. Nevins appeared on behalf of plaintiffs. Marc B. Mihaly, Kenneth Kimmell and E. Clement Shute, Jr. appeared on behalf of defendants. Timothy A. Bittle and John M. Groen appeared on behalf of *amicus curiae* Pacific Legal Foundation. Upon consideration of the submitted briefs and oral argument, good cause appearing therefore, and for the reasons stated in the courts oral analysis at the hearing, the court renders the following final judgment.

IT IS ORDERED that:

1. Defendants' motion for summary judgment on all causes of action is granted.

2. Plaintiffs' cross-motion for summary judgment on all causes of action is denied.

3. Defendants are referred to Local Rule 292 concerning their request for costs.

IT IS SO ORDERED.

DATED: November 15, 1989.

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD J. GARCIA,
U.S. DISTRICT JUDGE

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, AND ITS AFFECTED MEMBERS, Plaintiffs & Petitioners, vs. CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20, inclusive, Defendants & Respondents.	NO. CIV. 89-638-EJG

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FRIDAY, SEPTEMBER 8, 1989

JAMES G. VINE, CSR, License No. 1515

. . . .

[p. 15] THE COURT: I'm going to ask defendant, prevailing party on these cross-motions, to prepare, first of all, a summary judgment, a summary order of judgment and submit that within ten days if you can, and then I'll give you more time to submit proposed findings

of fact and conclusions of law in support of your judgment.

I'll try to give you a brief overview of why I agree with most of the position you take in your briefs and disagree with the plaintiffs.

My notes may be out of sequence as far as your briefs are concerned, but I think I hit each of the causes of action in my oral analysis.

[p. 16] Regarding the first cause of action, I think it's the first cause of action, yes, for violation of California's Environmental Quality Act. This cause of action is pled in seven counts, each count alleging failure to comply with some aspect of the act. This tends to make the Complaint as to this cause of action somewhat confusing. However, the validity of the several counts hinges on whether an environmental impact report was required prior to the adoption of the ordinance, or whether a negative declaration was sufficient.

From the materials submitted, there is an absence of any substantial evidence that the fee imposed will cause a significant environmental effect.

I disagree with plaintiff's contention that the fee will cause "development slight." First of all, the fee is set lower than most surrounding jurisdictions and I believe it's low enough that it's doubtful that it alone would cause commercial developers to go to outlying areas outside the city.

Also, I agree with the defendants that the final environmental impact report on the city's general plan update considered everything that could be considered at the

time. The mere possibility of environmental effect is not sufficient to require and EIR, substantial evidence is required.

[p. 17] The California Supreme Court has held that an EIR must be prepared "where it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact."

In reviewing the agency's determination, the Court must determine whether substantial evidence supported the agency's conclusion as to whether the "fair argument" could be made.

Applying these standards, I believe that defendants properly determined that there was not sufficient evidence to make out a fair argument of a substantial environmental impact.

Regarding the second cause of action that the fee imposed by the ordinance constitutes a taking without just compensation in violation of federal and state constitutional provisions. I agree with defendants from the submittals that the city properly determined that there was a substantial nexus between new commercial development and increased demand for low income housing, based on the findings of the Keyser report they commissioned.

I also agree that the defendants' analysis of the Nollan case and the test it sets forth to determine if there was a taking.

Contrary to plaintiff's position, I do not believe [p. 18] that, or Nollan does not suggest that a regulation

constitutes a taking if an outright prohibition of the activity would constitute a taking. While Nollan does discuss whether an outright prohibition of the activity would be an unconstitutional taking, nothing in that decision or in any preceding or subsequent case brought to the Court's attention suggests that there is an additional test.

Generally, courts have recognized that land use regulation does not effect a taking if it substantially advances legitimate state interest and does not deny an owner economically viable use of his land. The Nollan case focused on the nexus between the burden imposed by the regulatory condition and the needs arising from granting a permit to the plaintiffs; such is also the focal point of the parties' debate in the case before me. I believe that defendants have established this nexus. Defendants' belief of this nexus is based on the Keyser report's finding of a clear link between the influx of commercial development and an increased need for low income housing. While plaintiffs attempt to chip away at the methodology employed by the Keyser report, plaintiffs seem to overlook that there is no requirement that the report be perfect; there is only a requirement that the above-mentioned test be met. Thus, the fact [p. 19] that the Keyser report was labeled, for example, "preliminary" is not that important. Keyser's recognition that certain parts of its analysis which were less than perfectly accurate, is also of little concern in the absence of some showing that these potential inaccuracies somehow skewed their conclusions. The fact that defendants only imposed fees that were fractions of the "true nexus" amounts found by the Keyser report indicates only that the defendant could have imposed a higher fee.

Finally, while it appears that the Keyser reports did combine county and city data, I do not believe that this potential concern makes defendant's reliance on an adoption of the Keyser finding irrational, particularly in light of the many areas in which the Keyser report frequently conservatively estimated its statistics with regard to the potential nexus.

As to plaintiff's contention that defendant's decision to impose the fee at the building permit stage rather than the occupancy stage destroys the nexus, I disagree. Several cases have upheld fees imposed at the time of the issuance of the building permit. See for example the Trent Meredith case cited by the defendants.

Regarding plaintiff's third cause of action, violation of equal protection under both the federal Fourteenth Amendment and state Article 1, Section 7, and [p. 20] Article 14, Section 16, of the California Constitution. Plaintiffs point to certain sections of the ordinance which treat developers in North Natomas differently than other city developers. Among other things, North Natomas developers are charged substantially lower fees and are provided with more flexible alternatives to fee payments than are other Sacramento developers.

The applicable standard for reviewing this ordinance is as follows: One, does the challenged legislation have a legitimate purpose? And, two, was it reasonable for the lawmakers to believe the use of the challenged classification would promote that purpose?

Plaintiffs concede that providing low income housing is a legitimate end; it contests whether these classifications would reasonably serve that end. Defendants'

evidence that North Natomas presently has a higher mix of low income housing than other areas of Sacramento in itself provides a rational basis for the disparate requirements of the ordinance. In addition, the fact that the City of Sacramento has already established fee and building requirements in North Natomas which preclude defendants from imposing additional housing or fee requirements on these developers, provides additional support for plaintiff's position.

Regarding the fourth cause of action for violation [p. 21] of California Constitution Article 13(a), Section 4, which requires pre-enactment voter approval prior to enactment of a special tax. The issue raised here is whether the fee on new commercial development imposed by the ordinance is a special tax as that term is used in Article 13.

Government Code Section 50076, enacted to implement the constitutional provision, further defines the term.

To prevail on this cause of action, plaintiffs must show that the fee is levied for general revenue purposes, which it incidentally it clearly is not; or that it exceeds the reasonable cost of providing the service for which the fee is levied. Plaintiff fails in this regard. The evidence submitted shows that the fee does not exceed the reasonable cost of meeting the low income housing needs of new employees created by new commercial development.

The Russ Building case cited by defendants appears to be dispositive on the issue.

Regarding the fifth cause of action for alleged violation of California Constitution Article 34, Section 1, which requires that low rent housing projects must be first submitted for approval to the voters of the city.

The evidence shows the ordinance in question was not submitted to the electorate.

[p. 22] Defendants first point out the plaintiffs have not complied with the procedural requirements in the California Code of Civil Procedure, a condition precedent to bringing this Article 34 challenge. Plaintiffs concede this and ask the Court to allow them to late file a publication of summons because they mistakenly believed it was not necessary in this action. In determining whether this mistake of law constitutes excusable neglect, I have considered that there was a case in point, the City of Ontario case cited by plaintiffs which should have put them on notice of the publication requirement because it was discussed there. I find plaintiffs were on notice and the mistake of law is not excusable.

In any event, in the alternative, I'd grant summary judgment to defendants on this cause of action on the merits pursuant to the Davis against Berkeley case both parties cite. I agree with the defendants' position in this regard that the facts that the Davis court states must be communicated to the voters, is not yet available. Submission to the voters would be premature and not required at this ordinance stage, by either the constitutional article or the Davis case.

Regarding the seventh cause of action pled, which alleges a violation of procedural due process. The essence of plaintiff's claim here is that the defendants [p. 23] were

biased in favor of the ordinance because the city was compelled by the North Natomas settlement agreement to adopt the ordinance without sufficient consideration.

In support of its positions, plaintiffs point to two statements made by one Steve Peterson and language from the initial study prepared by the city in its environmental review of the ordinance stated.

Plaintiffs evidence is insufficient to withstand summary judgment. The terms of the settlement do not compel the City Council to adopt this ordinance; plaintiffs do not claim that it does. The language in the statements submitted by plaintiffs in large part does not support plaintiff's contention that the City Council felt compelled to adopt the ordinance. To the marginal extent that it does, the evidence is insufficient to raise a genuine issue of material fact under Anderson against Liberty Lobby.

In the eighth cause of action in its Complaint, plaintiffs contend that defendants have violated Government Code Sections 66000 et seq. The dispute among the parties centers on whether the ordinance violates Government Code Section 66001 requiring that certain actions be taken by local agencies with respect to specific projects.

Plaintiff's suggestion that the statute requires [p. 24] defendants to provide a mechanism for a case-by-case analysis of the impact of specific projects I believe is mistaken. The statute merely sets forth the specific actions to be taken by the local agency when imposing the fee on a specific project. As argued by defendants, the section is clearly designed to address the implementation and operation of the fee, rather than its initial establishment.

It's for these reasons that plaintiff's motion for summary judgment is denied. Motion for summary judgment by the defendants is granted on all causes of action.

Could you tell me, Mr. Kimmell, how soon you could get the proposed findings before the Court?

MR. KIMMELL: Thirty days or sixty days, your Honor.

THE COURT: I'll assume you're going to serve a copy on the plaintiffs. I guess you want a copy, don't you?

MR. LEVY: Yes, your Honor.

THE COURT: I'll split the difference, 45 days.

MR. KIMMELL: Fine, your Honor.

THE COURT: I'd like the summary order within ten if you can do that.

Any questions?

MR. LEVY: No, your Honor.

MR. MIHALY: No, your Honor.

[p. 25] THE COURT: All right, thank you, counsel.

MR. KIMMELL: Thank you, your Honor.

[p. 26] REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

This is to certify that I was present in court as official court reporter during the proceedings had in the before-entitled case on Friday, September 8, 1989; that I reported in shorthand the proceedings had in said matter, and thereafter reduced my shorthand notes so taken to typewriting and the foregoing pages 3 to 25, inclusive, contain a full, true and correct statement and record of said proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, this 21st day of September, 1989.

/s/ James G. Vine
JAMES G. VINE
Certified Shorthand Reporter

APPENDIX C

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members, Plaintiffs-Appellants, v. CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, Defendants-Appellees.	No. 89-16398 D.C. # CV-89-638-S-EJG (Eastern California) ORDER (Filed Jan. 7, 1992)
CITY AND COUNTY OF SAN FRANCISCO, Amicus.	

Before: SCHROEDER, BEEZER, and NOONAN, Circuit Judges.

Judges Schroeder and Noonan have voted to deny the petition for rehearing. Judge Beezer would grant the petition for rehearing. The panel has unanimously voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

ADOPTED 3/7/89

AMENDED
ORDINANCE NO. 89-013

ADOPTED BY THE SACRAMENTO CITY COUNCIL
ON DATE OF MAR 7 1989

AN ORDINANCE ADDING SECTION 33 TO THE COMPREHENSIVE ZONING ORDINANCE OF THE CITY OF SACRAMENTO, ORDINANCE NO. 2550, FOURTH SERIES, RELATING TO HOUSING TRUST FUND REQUIREMENTS FOR NON-RESIDENTIAL DEVELOPMENT PROJECTS (M87-086)

I. CITYWIDE FINDINGS

The Council of the City of Sacramento finds and declares as follows:

A. New office, commercial, research and development, manufacturing, industrial and warehouse uses hereinafter referred to as "non-residential uses" or "development projects" in the City of Sacramento have and continue to be a major factor in attracting new employees to the region. A substantial number of these employees and their families reside or will reside in the City of Sacramento. These new employees and their families create a need for additional housing in the City.

B. Traditionally these non-residential uses have benefited from a supply of housing for their employees available at competitive prices and locations close to the place of

employment. However, in recent years, the supply of housing has not kept pace with the demand for housing created by these new employees and their families. If this shortage were to grow or continue, employers would have increasing difficulty in locating in or near the City due to problems associated with attracting a labor force. Employees would be unable to find appropriate housing in the area, and accordingly would be forced to commute long distances. This situation would adversely affect their quality of life, consume limited energy resources, increase congestion on already overcrowded highways, and have a negative impact on air quality.

C. The competition for housing is especially acute with respect to households of low income (those households with incomes of 80% or below median County income). An identifiable portion of the new employees attracted to the City by new non-residential development will live in low and very low income households and will therefore compete with present residents for scarce affordable housing units in the City. Increasing the production and availability of low income housing is especially problematic. Prices and rents for housing affordable to households of low and very low income remain below the level needed to attract new construction. This is even more true for households of very low income (those with incomes 50% or below County median income). Federal and State housing finances and subsidy programs are not sufficient by themselves to satisfy the low

income housing requirements associated with this employment.

D. The City of Sacramento, in cooperation with the County of Sacramento, created a City/ County Housing Finance Task Force to examine housing needs and financial mechanisms to address those needs in the Sacramento area. The report of the Task Force examined the connection between non-residential development projects and housing needs with special emphasis on very low income housing needs. The report concluded that a clear nexus can be established between the employees of various commercial and industrial buildings or land use types and the number of very low income employee households that are directly associated with such buildings and will accordingly impact the Sacramento housing market. The report further quantified the share of this need represented by very low income households.

The City of Sacramento reviewed the Nexus report and recalculated the housing subsidy amounts based on the employment densities contained in the City's General Plan. Assuming a housing subsidy of $12,000 per unit, the City concluded that each additional square foot of office development, for example, contributes to the need for low income housing subsidy in the amount of $2.74. Similar conclusions for other uses were as follows: research and development, $1.87; manufacturing, $1.32; warehouse, $.82; commercial, $4.33; and hotel, $1.90.

While these numbers may be approximate, it is clear that such development brings in new employees, an estimable percentage of those employees will live in Sacramento County, and that this number yields a certain number of households from which a definable number will be of very low income. Adjustments may be made to this number of households to take into account household size, and multiple earner households, previously housed employees, etc., to yield the approximate per square foot contribution each employment activity contributes to the net new need for housing subsidy.

E. Accordingly, it is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income households necessitated by such development directly upon the sponsors of the development, and indirectly upon the occupiers. The imposition of a housing impact fee and/or housing construction requirement is an appropriate means to accomplish this purpose. In calculating the amount of such fee, the City Council has taken into account other factors in addition to the simple calculation of contribution. These include impact of the fee on construction costs, special factors and hardships associated with certain types of development, and legal issues.

F. The City of Sacramento, on October 15, 1987, adopted several air quality mitigation measures as part of the Sacramento General

Plan Update. One of the mitigation measures was a Housing Trust Fund component which provided for the adoption of a housing fee or housing construction alternative.

G. The need for additional production of housing, especially infill and low income housing, was also addressed in the settlement of litigation surrounding the North Natomas Community Plan. On March 29, 1988, the City of Sacramento entered into a North Natomas Settlement Agreement. The parties to that Settlement Agreement recognized that new employment development, in addition to adversely impacting the supply and availability of affordable housing, increasing housing demand, which if unmet in the City, will in turn increase commuting distances, create additional traffic congestion, energy consumption and air pollution.

An alternative method of offsetting and mitigating this traffic congestion is to provide additional housing in "infill" areas which are already served by infrastructure and not otherwise experiencing new residential construction, since such areas are close to employment centers and public transit service. The North Natomas Settlement Agreement recognized that the development of infill low income housing would be of benefit to the City and region, and accordingly provided that the City would adopt an ordinance providing a means by which new employment development would contribute to the supply of additional housing.

H. Residential infill areas offer a great potential for meeting the City's growth needs. However, the City has not experienced new residential development within these areas. By promoting infill incentives, the City can stimulate the construction of housing that would not otherwise be built, thereby increasing the overall supply of housing available for potential employees located within the City's employment centers.

I. The Nexus report examined the relationship between the number of additional employees associated with various commercial and industrial buildings or land uses and the number of additional households that are directly associated with such buildings and will accordingly impact the Sacramento housing market.

The City of Sacramento reviewed the Nexus report based on the employment densities in the City's General Plan and concluded that each additional square foot of office development contributes to housing demand by .00229 units, research and development contributes .00164 units; manufacturing contributes .00075 units; warehouse contributes .00038 units; commercial contributes .00191 units; and hotel contributes .00076 units. Based on the Nexus report, the dwelling unit to jobs ratio for non-residential uses in the Sacramento area is one dwelling unit per 1.75 new employees.

J. Accordingly, it is appropriate to impose some of the increased burden of providing housing necessitated by such development

directly upon the sponsors of the development and indirectly upon the occupiers. In calculating the housing construction alternative, the City recognized that the private market will address much of the housing demand associated with these non-residential uses. At the same time, private development within infill areas is unlikely to occur without additional significant development incentives. The imposition of a housing construction requirement is an appropriate means to accomplish this objective. As an alternative to full fee payment, the housing construction requirement combines a 20% housing fee with a requirement to construct one dwelling unit within infill areas for every 18 additional employees. This requirement is established well below the relationship between housing demand and non-residential uses for the Sacramento area. Notwithstanding this finding, the housing construction requirement shall become a combination 40% housing fee with a requirement to construct one dwelling unit for every 24 additional employees if and when the North Natomas Settlement Agreement is amended.

K. The Housing Element of the City of Sacramento General Plan calls for the provision of additional housing for all sectors of the population, to accommodate the demands of both existing and new residents attracted to the region by increased employment. The housing element also provides that the City should make special efforts to encourage an increased supply of housing affordable to low and very low income households.

L. It is the purpose of this chapter to establish a feasible means by which developers of non-residential development projects assist in (1) increasing the supply of housing and low income housing; and (2) increasing the supply of housing in close proximity to employment centers. The housing fees and housing construction requirements contained in this section are designed to create a rational relationship between the amount of housing need created by the employment use and the size of the fee or housing construction requirement, taking into account the impact of such fee on housing construction costs and economic feasibility.

The Citywide housing exaction is based upon the Sacramento General Plan, the Sacramento General Plan Environmental Impact Report, the North Natomas Community Plan (NNCP), NNCP Environmental Impact Report and air quality mitigation measures, North Natomas Settlement Agreement, the Sacramento City/County Housing Finance Task Force report and recommendations, together with the reports appended thereto quantifying the Nexus between development and low income housing need. In view of the numerous assumptions and potential in exactitudes which must attend any such studies and recommendations, the City Council has determined that the fees and unit requirements will be set well below the calculated cost of providing market rate and low income housing to persons attracted to the City by these employment opportunities.

M. Although the low-income housing availability issue may be addressed at the City level, the housing market is a regional market. While evidence presented to the Council indicates that imposition of a fee in the City alone will not cause substantial commercial development to leave the City, the Council notes that the relationship between increased commercial development and the need for low income housing is a regional relationship, including both the City and the County. Commercial development in one jurisdiction will generate the demand for low income housing in the other jurisdictions. Conversely, the absence of available low income housing in one jurisdiction puts undo pressure on the other. Adverse environmental effects associated with long commutes impact the citizens of both the City and County. Therefore, a similar fee on commercial development should be imposed within the same time frame in the City and County and dedicated to similar purposes.

II. NORTH NATOMAS FINDINGS

The Council of the City of Sacramento hereby incorporates the previous Citywide findings and also finds and declares as follows:

A. In adopting the North Natomas Community Plan (NNCP), the City Council determined that development in North Natomas could adversely impact development in North Sacramento. To mitigate that impact, the

NNCP requires North Natomas non-residential developers to participate in a Housing Trust Fund to stimulate housing development in North Sacramento.

B. In achieving the jobs-housing balance for North Natomas, vacant residential land in North Sacramento will be utilized. Housing demand generated by Phase I employers shall be met initially through residential development in Phase I of the planning area, as well as development of residential land in North Sacramento.

C. The NNCP establishes a 66% housing units-to-jobs ratio for that portion of the planning area within the City limits and a 58% ratio for the overall planning area. Because of the significant dwelling unit deficiency that could result within the North Natomas planning area, this ratio must be supplemented by developing 4,340 units in North Sacramento. After the development of these units, the Housing Trust Fund requirements for North Natomas will be fulfilled unless future land use amendments require more housing to maintain the specified housing-to-jobs ratio.

D. It is critical that North Natomas non-residential developers participate in efforts, such as the Trust Fund, to get housing developed in adjacent communities, especially North Sacramento. The responsibility for the units will be spread on an employee per acre basis for each non-residential land use in North Natomas. Given a housing fee of $3,500 per dwelling unit to stimulate residential development in North Sacramento,

the City has concluded that each additional square foot of non-residential land uses will need to contribute the following housing subsidy fee amounts: Highway-Commercial, $1.04; Community/Neighborhood Commercial, $.78; Office/Business, $.78; M-50, $.67; M-20, $.55; and Light Industrial, $.42.

As an alternative to fee payment, non-residential developers can construct or cause to construct housing units in North Sacramento. Given a ratio of one dwelling unit per 15 employees, the City has concluded that each additional square foot of non-residential land use will contribute to the construction of housing units according to the following factors: Highway-Commercial, .000296 units; Community/Neighborhood Commercial, .000222 units; Office/Business, .000222 units; M-50, .000191 units; M-20, .000157 units; Light-Industrial, .000121 units.

III. AMENDMENT TO ZONING ORDINANCE

Section 33 is hereby added to the Zoning Code of the City of Sacramento as follows:

SECTION 33

HOUSING REQUIREMENTS FOR NON-RESIDENTIAL DEVELOPMENT PROJECTS

A. GENERAL PROVISIONS

1. Limitation. Unless otherwise expressed in this Zoning Ordinance, the provisions of this Section are the exclusive

procedures and rules relating to housing impact fees, and housing development requirements, in the event of conflict, these provisions shall prevail over any other provisions of this Zoning Ordinance.

B. LOW INCOME HOUSING FUNDS

1. Establishment and Definition. There are hereby established two separate funds. These funds may receive monies from other sources.

   A. Citywide Fund. The Citywide Low Income Housing Fund ("Citywide Fund") shall receive all monies contributed pursuant to Paragraph D.1 and E.1.

   B. Natomas Fund. The North Natomas Fund ("Natomas Fund") shall receive all monies contributed pursuant to Paragraph D.2.

2. Purposes and Limitations.

   A. Citywide Fund. Monies deposited in the Citywide Fund shall be used to increase and improve the supply of housing affordable to households of low income, with priority given to very low income households. For purposes of this section, "low income households" are those households with incomes of eighty (80) percent or below the median income in the County of Sacramento as set forth from time to time by the U.S. Department of Housing and Urban Development and "very

low income households" are those households with incomes of fifty (50) percent or below the same median income. Monies may also be used to cover reasonable administrative expenses not reimbursed through processing fees. No portion of the Citywide Fund may be diverted to other purposes by way of loan or otherwise.

B. Natomas Fund. Monies deposited in the Natomas Fund shall be used to increase the supply of housing units located within the North Sacramento Community Plan area. Monies may also be used to cover reasonable administrative expenses not reimbursed through processing fees. For purposes of this paragraph, housing units include any price or tenure type of housing.

3. Administration. These funds shall be administered by the Director of the Sacramento Housing and Redevelopment Agency (hereinafter "SHRA Director") who shall have the authority to govern the Fund consistent with this Section, and to prescribe procedures for said purpose, subject to City Council approval.

4. Use and Disbursement of Monies in the Fund

A. Citywide Fund. Monies in the Citywide Fund shall be used in accordance with the adopted Housing Assistance Plan Program and

Financing Strategy to construct, rehabilitate, subsidize, or assist other governmental entities, private organizations or individuals in the construction of low income housing. Monies in the Citywide Fund may be disbursed, hypothecated, collateralized, or otherwise employed for these purposes from time to time as the SHRA Director so determines is appropriate to accomplish the purposes of the Citywide Fund. These uses include, but are not limited to, assistance to housing development corporations, equity participation loans, grants, pre-home ownership con-investment, pre-development loan funds, participation leases, or other public/private partnership arrangements. The Citywide funds may be extended for the benefit of both rental or owner occupied housing.

B. Natomas Fund. Monies in the Natomas Fund shall be used to increase the supply of housing units in North Sacramento in accordance with the policies contained in the North Natomas Community Plan (NNCP). For purposes of this section, increasing the supply of housing includes both the construction of housing and the rehabilitation of dangerous residential buildings as defined in Chapter 50 of the City Code. Monies in the Natomas Fund may be dispersed,

or otherwise employed for these purposes by the SHRA Director, after consultation with the Planning Director, to assure compliance with the NNCP policies and objectives.

5. Location of Citywide Units to Be Assisted with Fund Monies

Subject to City Council approval, the SHRA director shall develop criteria for the location of the units to be assisted with Citywide Fund monies. The purpose of this criterion shall be to: (1) ensure a reasonable geographical linkage between non-residential development projects subject to this ordinance and the assisted low income housing such that future residents of the housing could reasonably commute to the commercial locations; (2) ensure conformity with the Fair Share Plan adopted by the City Council; and (3) promote air quality goals (e.g., access to public transportation). For purposes of criterion (1) above, any location which lies within *seven* (7) miles of the non-residential development project subject to this ordinance shall be presumed to be within reasonable commuting distance. Locations within one quarter (1/4) mile of either existing or planned transit services shall be given preference within the seven mile commuting distance. Locations further than the seven mile distance may receive assistance from the Citywide Fund provided that the

SHRA director finds that access to existing or planned public transit render it reasonable that employees of the development project could commute from the location of the assisted housing. If due to regional growth, increased traffic congestion, or other factors, the SHRA administrator determines at any time in the ensuing year, sites which meet criterion (1) above will not be available, the SHRA director and the director of the Planning Department shall develop and present to the City Council a proposal for ensuring a continued linkage between non-residential development projects subject to this ordinance and the location of assisted housing. Such a proposal may be presented in connection with the Annual Evaluation in paragraph 6 below. Criteria numbers (2) and (3) shall be effective if and when the North Natomas Settlement Agreement is amended.

6. Annual Evaluation. Commencing one year after the effective date of this Section, and annually thereafter, the SHRA Director and Planning Director shall report to the City Council, the City Planning Commission and the Sacramento Housing and Redevelopment Commission on the status of activities undertaken with the Citywide Fund and North Natomas Fund. The report shall include a statement of income, expenses, disbursements, and other uses of the Fund. The report shall also state the number of low income and

total housing units constructed or assisted during that year and the amount of such assistance. The report shall evaluate the efficiency of this Section in mitigating the City's shortage of low income housing available to employees of the projects subject to this Section, stimulating housing development in North Sacramento and alleviating the jobs-to-housing unit imbalance in North Natomas. In this report, the SHRA Director and the Planning Director shall also recommend any changes to this ordinance necessary to carry out its purposes, including any adjustments necessary to the fee or number of housing units required. This report shall contain the findings required by Government Code Section 66001(d).

C. APPLICATION OF THE HOUSING REQUIREMENT.

1. Application: This section shall apply to non-residential development projects that are proposing the construction, addition or interior remodeling of any non-residential development project. This section shall apply to mixed or combined use projects if such projects propose the construction, addition or interior remodeling of such uses. Notwithstanding the foregoing, this section shall not apply to projects which fall within one or more of the following categories:

A. The precise portion of a non-residential development project which

requires (1) discretionary permits (as defined herein) and (2) has received final approval of any such permit on or before March 29, 1988; provided, however, that this exception shall not apply to a non-residential development project which is a permitted use within the applicable zone and therefore does not require discretionary permits. For purposes of this paragraph, the term "Discretionary Permit" means any of the following permits: special permit, development plan ("R") review and design review as required pursuant to the City of Sacramento Zoning Ordinance; or

B. Projects which are the subject of Development Agreements currently in effect with the City of Sacramento, or of Disposition Agreements, Owner Participation Agreements, or Memoranda of Understanding with the Redevelopment Agency of the City of Sacramento, approved prior to the effective date of this ordinance, where such agreements or memoranda do not provide for compliance with this Ordinance; or

C. The non-residential uses set forth in a building permit application accepted as complete by the City or a foundation permit issued by the City prior to the effective date of this Ordinance; or

D. A non-residential development project which has received subdivision map approval prior to March 29, 1988 and has been required by the City to finance unreimburseable off-site sewer, drainage and water improvements that directly benefit residential infill sites (as defined herein); or

E. Residential uses as set forth in Section 2 of the Sacramento Zoning Ordinance; or

F. That portion of any development project located on property owned by the State of California, the United States of America or any of its agencies, with the exception of such property not used exclusively for state governmental or state educational purposes; or

G. Any development project which has received a vested right to proceed without housing fees pursuant to State Law.

2. Definitions: For purposes of this Section, the following definitions shall apply:

A. "Non-residential Development Project" is defined as any commercial or industrial use set forth in Section 2 of the City of Sacramento Zoning Ordinance, and includes any other use that is determined by the Planning Director to impact housing demand.

B. "Gross square feet" is the area included within the surrounding walls of the non-residential development project as determined by the Planning Director. This area does not include garages or carports.

C. "Construction" is a new non-residential development project subject to this section.

D. "Interior remodel" is a tenant improvement which results in a change in the type of use of the non-residential development project that increases the employee density of the project as determined by the Planning Director.

E. "Addition" is adding gross square feet to an existing non-residential development project subject to this section.

F. "Housing Units" is a new dwelling unit of any tenure type or price, including the rehabilitation of dangerous residential buildings as defined in Chapter 50 of the City Code.

G. "Planning Director" is either the Planning Director or the Director of Planning and Development as determined by the Director of Planning and Development.

D. HOUSING FEE REQUIREMENT

1. *Citywide Payment of Fee as a Condition of Issuance of a Building Permit.* Except as provided elsewhere in this Section, no Building Permit shall be issued for any non-residential development project, located outside the North Natomas Community Plan area, subject to this Section as set forth in Paragraph C unless and until a Housing Fee is paid to the building Inspector of the City of Sacramento who shall deposit such fee in the Citywide Fund. The amount of the fee shall be computed as follows: Gross Square Feet Non-Residential Space X (Applicable Fee by type of use as listed in Appendix A to this Section) = Housing Payment. For purposes of this Section, the fees for an interior remodel shall be the fees for the new use as defined in Appendix A, less any fees that either were paid or would have been paid based on the original use of the building.

2. *North Natomas Payment of Fees as a Condition of Issuance of a Special Permit or Building Permit.* Except as provided elsewhere in this Section, no Special Permit or Building Permit shall be issued for any non-residential development project located within the North Natomas Community Plan area unless and until a Housing Fee is paid to the Building Inspector of the City of Sacramento, who shall deposit such fee in the Natomas Fund. The amount of the fee

shall be computed as follows: Gross Square Feet Non-Residential Space X (applicable fee by type of use as listed in Appendix C to this Section) = Housing Payment.

3. *Compliance through Housing Construction.* As an alternative to payment of the Fee set forth in this Section, an applicant for a non-residential development project subject to the Citywide requirements of this Section may elect to comply with those requirements partially through the construction of housing as provided in Paragraph E.1 below. An applicant for a non-residential development project, subject to the North Natomas requirements of this Section, may elect to comply with those requirements through the construction of housing as provided in Paragraph E.2.

E. HOUSING CONSTRUCTION REQUIREMENT

1. *Citywide Requirement.* As an alternative to the fee requirement of Paragraph D.1, an applicant for a permit for uses subject to the requirements of this Section, may elect to perform both of the following prior to the issuance of a building permit for such activity: (1) pay a fee that is at least 20 percent of the fee required pursuant to Paragraph D.1 above and listed in Appendix B to this Section; and (2) demonstrate that it will construct or cause to be constructed any value or tenure type of housing as determined by the following formula:

Gross Square Feet Non-Residential Space X (Applicable Factor by Type of Use as listed in Appendix B to this Section) = Housing Units. No building permit shall be issued by the Building Inspector for any non-residential development project unless and until the Planning Director has certified that the requirements of this Section have been met.

Notwithstanding the requirements of this paragraph, the minimum fee shall become at least 40 percent of the fee required pursuant to paragraph D.1 above and listed in Appendix B if and when the North Natomas Settlement Agreement is amended.

2. *North Natomas Requirement.* As an alternative to the housing fee requirement as provided in Paragraph D.2 above, an applicant for any non-residential development project within the North Natomas Community Plan (NNCP) area may elect to construct or cause to be constructed any value or tenure type of housing as determined by the following formula: Gross Square Feet Non-Residential Space X (Applicable Factor by Type of Use as listed in Appendix C to this Section) = Housing Units. This housing shall be located in those areas of the North Sacramento Community Plan as defined in Paragraph E.7.B.

3. *Approval of Proposal by the Planning Director.* An applicant who chooses to comply with the requirements of this

Section partially through the construction of housing shall submit to the Planning Director sufficient information to enable the Planning Director to determine that the applicant will construct or cause to be constructed the required number of housing units. The application shall demonstrate that the applicant possesses the financial means to commence and complete the construction of the housing within the required time period.

Where the applicant intends to construct housing units through participation in a joint venture, partnership, or similar arrangement, the applicant must certify to the Planning Director that the applicant has made a binding commitment, enforceable by the applicant's joint venturers or partners, to contribute an amount to the joint venture or partnership equivalent to or greater than the amount of the fee they would otherwise be required under Paragraph D, less the portion of the housing requirement of this section actually met through the payment of fees, and that such joint venture or partnership shall use such funds to develop the housing subject to this Section.

The Planning Director may issue guidelines for the administration of this requirement. If the Planning Director approves the proposal, he or she shall issue a certificate so indicating. This

certificate shall be recorded and indicate that compliance with this Section is an obligation of the owner of the non-residential property.

4. *Commencement of Construction.* Within one year of the issuance of the first building permit for a use subject to this Section, the applicant shall provide written certification to the Planning Director that it has commenced construction of the housing units under this paragraph, and where the applicant elects to construct housing through a joint venture or partnership, or other legal entity, that the applicant's monetary contribution to the joint venture, partnership, or other legal entity has been paid in full or has been posted in an irrevocable letter of credit. No certificate of occupancy for the non-residential use shall be issued by the Building Inspector until the applicant complies with this paragraph. This one year period may be extended by a maximum of two one year periods based on evidence submitted by the applicant, if the Planning Director determines that 1) there is good cause for an extension or an additional extension, 2) the failure to comply with the time limits of this paragraph is beyond the owner's control, and 3) the owner has made a reasonable effort to comply with this paragraph.

5. *Completion of the Housing Requirement.* The applicant shall obtain a final inspection from the Building Inspector

for the housing required by this paragraph within two years of the issuance of the first building permit for non-residential use subject to this section. This time period may be extended by the Planning Director by a maximum of two one year periods upon showing good cause as defined in Paragraph E.4.

6. *Fractional Housing Units.* In the event the application of Appendix B or C to an applicable project creates an obligation to construct a fractional housing unit, that fraction shall be converted into an addition to the housing fee, or in the alternative at the election of the applicant, an additional unit.

7. *Location of Housing Units Constructed.*

   A. *Citywide Requirements*: Housing units constructed under Paragraph E.1 shall be located on deep lots or infill sites as defined in Section 9 of the City of Sacramento Zoning Ordinance.

   B. *North Natomas Requirement*: Housing units constructed under Paragraph E.2 shall be located within the following areas of the North Sacramento Community Plan.

      1) Vacant or underutilized lands which have appropriate zoning and land use designations.

      2) Vacant lands next to urban areas or areas with services

which can be easily extended to accommodate development.

3) Vacant infill lots within existing urban areas south of I-80 where services are readily available.

8. *Failure to Cause Housing Construction.* In the event certification of housing construction is not provided as required by this Paragraph E, the Planning Director will determine an amount equal to 150% of the fee which would have been due and owing under Paragraph D to be paid to the City together with interest accrued from the date of the first building permit issuance for the non-residential use and shall so notify the applicant. If the applicant fails to demonstrate good cause for the non payment, said amount shall be assessed against the applicant.

If this amount is not paid by the applicant within sixty days of the expiration of the applicable time period, the City shall record a special assessment lien against the non-residential subject to this section in the amount of any fee and interest owed, or in the alternative the certificate of occupancy shall be revoked for the non-residential use.

After appropriate notice, the City Council shall hold a special assessment hearing. If the assessment is confirmed, the delinquent fee shall constitute a special assessment against the parcel or parcels used in the development project subject to this section. Each such assessment

shall be subordinate to all existing special assessment liens previously imposed upon such parcel and paramount to all other liens except for those state, county, and municipal taxes with which it shall be upon parity. The lien shall continue until the assessment and all interest due and payable thereon are paid to the City.

F. VARIANCES

1. *Variances.* A variance from the provisions of this Section may be granted to an applicant by the Planning Commission. The applicant must file an application for a variance within 10 days of the Planning Director's determination pursuant to Paragraph D or E. Any hearing required by the provisions of this Section shall be governed by the provisions of Section 14 of this Zoning Ordinance.

2. *Application.* The application for a variance shall include financial and other information that the Planning Director determines is necessary for staff to perform an independent evaluation of the applicants' rationale for the variance and shall be a matter of public record.

3. *Standards.* No variance shall be issued to an applicant unless:

   a. Special circumstances, unique to that project and not generally applicable to other projects so that the same variance would be appropriate for any applicant facing similar

circumstances, justify the grant of the variance; and

b. The project would not be objectively feasible without the modification; and

c. A specific and substantial financial hardship would occur if the variance were not granted; and

d. No alternative means of compliance are available which would be more effective in attaining the purposes of this section than the relief requested.

4. *Low Density Employment Uses Requiring Specialized Structures.* A variance may be granted in the case of development projects which consist of construction built for and suitable solely for a specific use involving few or no employees. In the case of a variance granted pursuant to this section for a use which involves some employees, the variance may specify a reduced fee applicable to the project. Any variance granted under this section shall expire upon the conversion of the building to another use or upon the remodeling of the building to permit additional employees.

5. *Findings.* In approving a variance, the Planning Commission shall make findings pursuant to each of the standards defined in Paragraph E.3.

G. ADMINISTRATION

1. *Application Procedures for Discretionary Projects Subject to this Section*

   Compliance with this Section will be made a condition of approval of each Special Permit approved for a non-residential development project subject to this Section. The application procedures defined in Paragraph G.2 shall apply to all special permit applications.

2. *Application Procedures for Ministerial Projects Subject to this Section*

   Applications for building permits for any project subject to the provisions of this Section shall not be deemed complete unless the application contains (1) a statement of the number of gross square feet in a non-residential development project to be constructed, added or remodeled that are subject to the requirements of this Section, together with documentation sufficient to support the application; (2) the intended use or uses for the non-residential development project by gross square feet; (3) a statement of an election by the applicant as to its choice of compliance with requirements of this Section through payment of the fee (Paragraph D), or construction of housing (Paragraph E).

   If compliance is purely through the payment of the fee, a copy of the building permit application shall be transmitted to the Planning Director by the Building

Inspector. If the compliance is through a combination of payment of fee and construction of housing, the Building Inspector shall transmit a copy of the building permit application to the Director and the applicant shall furnish the information required in Paragraph G to the Planning Director.

3. *Determination of Fee.* The Planning Director shall determine the amount of fee and/or number of housing units required to be constructed, and shall so inform the Building Inspector who shall collect the required fee and transmit it to the appropriate Fund.

4. *Revisions to Appendix A and B.* The fees set forth in Appendix A, B and C shall be revised effective January 1 of each year by the percentage increase or decrease in the building cost Index of the Cost Indices for Twenty Cities published by M.C. McGraw-Hill, Inc. or its successor since January 1 of the previous year. The SHRA Director, in consultation with the Planning Director, shall prepare a recommendation to the City Council for such revision on an annual basis.

5. *Infill Area Designations.* The Planning Director shall make a determination of infill areas for purposes of this Section on an annual basis.

6. *Processing Fees.* The Planning and Development Department shall collect a processing fee to administer the Housing Trust Fund Ordinance. This fee or fees

will be established by City Council Resolution.

DATE PASSED FOR PUBLICATION: FEB 28 1989

DATE ENACTED: MAR 7 1989

DATE EFFECTIVE: APR 6 1989

/s/ Anne Rudin
MAYOR

ATTEST:

ACTING /s/ Janice Beaman
Assistant CITY CLERK

APPENDIX A

HOUSING FEE REQUIREMENT
CITYWIDE

* TYPE OF USE	FEE/BUILDING SQUARE FEET
Office	$.95
Hotel	$.90
Research and Development	$.80
Commercial	$.75
Manufacturing	$.60
Warehouse	$.25

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* Non-residential development projects that do not fall within a specific type of use category will be evaluated by project basis to determine an appropriate fee.

APPENDIX B

HOUSING FEE AND CONSTRUCTION ALTERNATIVE CITYWIDE

* TYPE OF USE	20% FEE/ BUILDING SQ. FT.	HOUSING UNIT FACTOR/SQ. FT.
Office	$.19	.000127
Hotel	$.18	.000042
Research and Development	$.16	.000091
Commercial	$.15	.000106
Manufacturing	$.12	.000042
Warehouse	$.05	.000021

* Non-residential development projects that do not fall within a specific type of use category will be evaluated on a project by project basis to determine an appropriate fee and housing unit factor.

APPENDIX C

HOUSING FEE AND CONSTRUCTION REQUIREMENT NORTH NATOMAS ONLY

* TYPE OF USE	FEE/BUILDING SQ. FT.	HOUSING UNIT FACTOR/SQ. FT.
Highway Commercial	$ 1.04	.000296
Community/ Neighborhood Commercial	$ .78	.000222
Office/Business	$ .78	.000222
M-50	$ .67	.000191
M-20	$ .55	.000157
Light Industrial	$ .42	.000121

* Each non-residential development project will be subject to a fee which is based on the applicable North Natomas Community Plan land use category.

APPENDIX E

[SEAL]

CITY OF SACRAMENTO

CALIFORNIA

OFFICE OF THE
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VOLUME III

ADMINISTRATIVE RECORD
FOR MATTERS RELATING TO THE
HOUSING TRUST FUND ORDINANCE

(M-87076)

6-9-89

APPENDIX 1

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November 25, 1987

MEMORANDUM

TO: Sacramento Housing and Redevelopment Agency
Attn: Lester Smith

FROM: Keyser Marston Associates, Inc.

SUBJECT: COMMERCIAL AND INDUSTRIAL DEVELOPMENT AND VERY LOW INCOME HOUSING NEXUS ANALYSIS

The following memorandum report summarizes Keyser Marston Associates, Inc's. (KMA's) preliminary analysis of the linkage between the development of various types of commercial and industrial buildings and very low income housing needs. The purpose is to illustrate the linkages between new employment in these buildings and the number of households meeting the very low income criteria that are directly associated with the buildings.

This analysis, which was contracted by the Agency, was intended to provide input to the Housing Task Force for use in its investigation of possible fee structures as one of the alternative means of raising funds for increasing the

supply of low income housing. The recent Nollan decision by the Supreme Court emphasized the need to establish the "nexus" or relationship between the government restriction or fee and the impact expected from the development or action.

This memorandum report is divided into two parts. The first summarizes the analysis and provides a discussion of the strengths and weakness of the analysis, data availability, and other points of special consideration. It also provides preliminary conclusions on the number of very low income households for each land use type and possible fee structure alternatives. The second part is an in-depth explanation of the steps of the analysis and a documentation of the data sources utilized.

Conclusions

The first conclusion of the analysis is that a very clear nexus can be established between the employees of various commercial and industrial buildings or land use types and the number of very low income employee households that are directly associated with the buildings. Even though some of the steps lack complete data substantiation of the precise numbers, the linkage clearly exists.

The second conclusion is that while a nexus clearly exists, the analysis and numerical results raise some major questions and issues about accounting for the growth of very low income households in a growing economy.

The numerical results of the analysis are that for every 100,000 square feet of building area, there are the following number of very low income employee households

that live in Sacramento County. The percentage of very low income employee households to all employees is indicated by the column on the right.

Building Type	Number of Very Low Income Employee Households	Percent all Employees
Office	18.4	4.3%
Research & Devel.	13.4	5.1%
Manufacturing	10.7	8.2%
Warehousing	3.3	10.0%
Retail	33.7	10.1%
Hotel	15.2	11.4%

The Analysis Approach and Framework

The analysis approach is to examine the employment associated with the development of 100,000 square feet of each of six building types. The six building types are:

Office
Research and Development (R&D)
Manufacturing
Warehousing
Retail
Hotel

The analysis is conducted for Sacramento County as a unit.

Table 1 presents the numbers for each step and building type. Following is a brief description of each step. A more detailed description is contained in the Appendix, Methodology and Documentation.

The Analysis Steps

Step 1. Estimate of Total New Employees

The first step identifies the total number of direct employees who will work at or in the building type being analyzed. Employment densities are based on local industry averages in some cases such as office, retail and hotel. For the three industrial categories the densities are based on local Sacramento analyses of employment densities per acre converted to buildings with FAR adjustments.

In starting with a number of employees in the building there is an implicit assumption that all employees are new employees to the County. If the employees in this building have relocated from other buildings, they will have vacated spaces somewhere else and somewhere in the chain new employees will have come to Sacramento County to work.

Step 2. Estimate of Employees Living in Sacramento County

This step factors out the employees who work in Sacramento County but live outside the county. The factor is generated by 1980 U.S. Census information which tells us that of the total number of people who work in Sacramento County, 89% also live there. This percentage varies slightly by occupation, but for ease of analysis the 89% factor was used for all six categories. On a preliminary judgmental basis, no updating was deemed necessary given the substantial percentage of both residential and

non-residential development that is occurring in Sacramento County vs. the other counties in the metropolitan area.

Step 3. Adjustment of Increases in Labor Force Participation

This step eliminates new employees who were previously living in Sacramento County but not working. One local analysis found that 18% of a the employment growth in Sacramento County during the 1970 decade resulted from increases in labor force participation but this rate was expected to decrease in the late 1980's. For analysis purposes a 15% factor was used and applied to all six categories.

Step 4. Estimate of the Number of Households

This step recognizes that there are frequently more than one employee per household and reduces the number of employees to the number of households. The SHRA is using the figure of 1.35 employees per non-elderly household, a figure derived from Census information. The 1.35 reduction factor is applied to all six categories.

Step 5. Breakdown of Employees by Occupation

This step divides the employees representing new households into occupational groupings using industry by occupation matrices prepared by the State Employment Development and the U.S. Department of Labor. Occupational categories include Professional/Technical/Managerial, Clerical, Craft/Kindred, Operator, Laborer.

("Industry" categories closely approximate our building type or land use starting point)

Step 6. Estimate of Employees Meeting Very Low Income Definition

In Step 6 occupation is translated to income distribution (without consideration for household size) with focus on the very low income end of the scale. For this step we could not locate a percentage distribution for any of the categories except office. For the other building type/land use categories and their related occupational spread, we had to rely on Sacramento wage survey material prepared by state and local sources. This survey material gave typical wage rates for sample jobs that could be related to occupations. KMA had to make judgments about the likely percentage that fell into the income levels that could qualify as very low income, or below $17,050 per year using SHRA numbers. This step is a weak link in the chain as far as documentation of the allocation by income is concerned. More research would likely enable a refinement of the numbers because surely better information exists at least at the national level.

Step 7. Estimate of Household Size Distribution

In this step, a household size distribution was sought in order to get from income distribution to the income and household size combinations that meet the definitions of very low income established by HUD and used by SHRA. Household size data is not readily available for the number of wage earners per household but the 1980

Census does provide a percentage breakdown of household size for households with incomes less than $15,000 and under 65 years of age. Since the $15,000 figure is 1979 dollars it was deemed a close enough approximation for $17,050 in the late 1980's.

Following is a percentage breakdown of households under $17,050 by size:

Household Size	Percent
1	36%
2	28%
3	18%
4	11%
5 or more	7%

This distribution was used for all building type/land use categories.

Step 8. Estimate of Very Low Income Households That Meet Size and Income Criteria

In this step we had to build a matrix of household size and income to establish probability factors for the two criteria in combination. For each occupational grouping a probability factor was calculated for each of HUD's income and household size levels. This step is performed for each occupational category.

To estimate the number of very low income households these probability factors calculated for each occupation are multiplied by the number of households by occupation in Step 5 and then totaled to arrive at the number of very low income households. This step is performed for each land use.

See in depth description and attached appendix table.

Step 9. Adjustment to Eliminate Most Multiple Earner Households

This last step makes an adjustment to eliminate most of the households that have two or more earners such that the incomes in combination make the household no longer qualify as very low income. The U.S. Census tells us that overall 40% of the households have one wage earner but in the under $15,000 households, 70% have only one wage earner. A 70% adjustment would make the assumption that all two or more income households do not qualify as very low income. Recognizing that there is likely a significant share of multiple wage earner households that still do qualify (particularly among minority households where families may be large and skill levels low), we made the judgment to use a 75% factor.

This final adjustment produces the number of very low income households directly associated with 100,000 sq. ft. of building area by type.

Issues Raised by the Analysis

1. Responsibility for Growth

The nexus analysis illustrates how the typical cross section of employees in a commercial or industrial building will likely include a certain number of employees from very low income households. The nexus analysis does not make the case that building construction is responsible for growth. Clearly many factors come into play in determining what makes a region grow. At best, it can be said that the production of buildings to accommodate growth

is but one of many factors that enable or contribute to its occurrence.

2. Direct vs. Indirect Employment

The analysis addresses direct employment only, or that which is employed within the building. In the case of office space, direct employment covers the various managerial, professional and clerical workers that work in the building; it does not include the janitorial workers, the window washers, the security guards, the delivery services, the landscape maintenance workers, and many others that are associated with the normal functioning of office buildings. These indirect employees tend to be the many service workers at the lower end of the pay scale. No data source could be located which deals with these indirect types of office employees. Confining the analysis to direct employment does not address all the low income workers associated with each land use and seriously understates the impacts.

Once the door is opened to indirect employees, there is the question of how far to take the analysis. For decades now, huge econometric models have grappled with the question of multipliers and produced a broad range of conclusions. We are not aware of any that have specifically addressed lower income jobs or households. Another approach to thinking about low income job generation is to think through where in the economy the low income jobs are to be found. Without undertaking such an analysis, we believe they would be largely represented in agricultural workers, a whole host of service workers

(many of which are not associated with particular buildings, like gardeners, transportation workers, hospital workers, construction laborers, etc.) In other words, any analysis that ties low income housing to particular types of buildings will continue to be incomplete.

3. Growth Inducing vs. Population Serving

The high proportion of low income employees in retail buildings raises the question as to whether retail should be treated the same as the other categories. The other categories are generally considered the primary growth inducers, whereas retail might be regarded as more population serving. Classical economic base theory divides all employment in a given geographical area between those engaged in activities which bring in dollars from the outside work (or "basic" employees) and those which serve the local economy. Every industrial category has some of both, but some industries such as manufacturing tend to have a far higher percentage of basic employees than local.

An economic base analysis would be a very different analysis than the nexus analysis presented here. It would produce one way of treating the land uses differently and would likely result in retail carrying less of a burden than, say, R&D. It should be recognized, however, than any economic base analysis is apt to be controversial since there are several schools of thought about growth generation and regional economies.

Qualifiers to the Analysis

The goal of this "first cut" through the analysis was to determine if the nexus could be found and to illustrate how it works. As such there were steps in the analysis where the data was insufficient to generate fully documented linkage numbers and thus judgments had to be made in order to complete the analysis. The agreement with SHRA was to use readily available data and leave further research until a later time if it was deemed necessary. As an example, we had good information on the occupational distribution of employees in manufacturing but could not locate data on the spread of, say, machine operators by income level. (Nor, of course, did we have the income distribution of manufacturing employees in general.) Instead we had to rely on sample wage scales for machine operators in Sacramento and estimate the percentages that likely fell into the various income categories. Surely data providing a spread by income exists at least on the national level which could perhaps be augmented by local union information.

In other cases metropolitan area wide averages were used when a more indepth analysis might distinguish differences by land use or occupation. For example labor force participation increases may be higher among office workers than industrial workers.

Finally, it should be emphasized that any analysis of this nature, no matter how in-depth, contains a great many numbers and numerous judgments relating to them. It will always be possible to take issue with a specific number. We do not believe, however, that changing most

of the individual numbers would fundamentally alter the conclusions of the analysis.

Nexus Conclusions and Implications on Fee Structures

Tables 2 through 5 present analyses that relate the conclusions of the nexus analysis to fee amounts and the revenue goals of the Housing Task Force.

It is important to emphasize that the conclusions on fees related to nexus amount establish the upper limit of fees that may be imposed while meeting the legal nexus test. The Task Force is at liberty to set fees in any amount below the nexus conclusions without further documentation.

Table 2 starts with the conclusions of the nexus analysis in terms of number of households and translates the figures into housing cost. The first set of numbers addresses the total cost of each unit at $36,000 per very low income housing unit and the second set address the subsidy or gap portion at $12,000 per unit. (per SHRA costs). The total cost burden would result in fees per square foot of building area ranging from $1.18 for warehouses to $12.13 for retail buildings. The subsidy or gap portion results in fees a third of these amounts, still making retail over $4 per square foot.

Table 3 provides a calculation of the revenue raised at the two fee levels based total housing costs and based on the subsidy or gap portion. The volume of construction is the 1984-86 average as calculated by SHRA staff. (See appendix table). The conclusion is that at the full fee amount

over $33 million would be raised, and at the subsidy portion fee over $11 million.

Table 4 examines the impact on construction costs of the fee amount. Since it is evident that the total housing amount produces clearly excessive fees and revenues, only the subsidy or gap portion is evaluated. Impacts on construction costs range from a low of 1.5% on average for warehouse structures to over 10% for retail buildings. Fee impact is also presented on a range basis to reflect the construction cost range for each land use. For example, office buildings may be one story structures costing under $40 per square foot or highrise structures costing twice that amount.

Table 5 presents some alternative suggestions for approaches to setting fee amounts. The first alternative is an across the board 50% cut of the "pure nexus" amount for the subsidy or gap portion. In this case, retail still comes out with a fee in excess of $2 per square foot or a 3% to 6% levy on construction costs. This approach adheres to the nexus relationships without regard to impacts on construction costs. Total revenue raised based on the 1984-86 construction activity would average over $5.5 million per year.

The second alternative approach is to produce a blend or hybrid of the nexus amount and acceptable impact on construction costs. For purposes of illustration, a three percent ceiling on construction cost impact was applied. Nexus amount numbers were reduced in varying degrees to meet the impact criteria. Since this alternative is sensitive to impact considerations, it would be appropriate to have fee variations for different construction costs. The

variation on the second alternative bypasses the varying construction cost issue by stating the fee in terms of a dollar amount on building permit valuation instead of building size.

The second alternative in either form would have raised revenues in the amount of over $3.5 million on the 1984-86 average annual construction activity.

Other Fee Considerations

The Task Force may wish to consider fee exemption to buildings below a certain size or dollar valuation. The rationale behind an exemption for small buildings is to minimize the impacts on developers of small projects and to minimize the impact on rents. Of the building types analyzed, retail projects would likely be the biggest benefactors, followed by neighborhood serving office structures. A possible cut off size for consideration might be 10,000 square feet. The revenue impact of a small building exemption has not been analyzed but is something could be done if desirable.

The Task Force should also consider fees on additions and improvements to existing structures. Again, an exemption for minimum size buildings is probably warranted.

Table 1

COMMERCIAL & INDUSTRIAL BUILDING TYPES VERY LOW INCOME HOUSING NEXUS ANALYSIS

STEPS		OFFICE		INDUSTRIAL R&D		INDUSTRIAL MANUFACTURING		INDUSTRIAL WAREHOUSING		RETAIL		HOTEL	
1.	Estimate of Employees per 100,000 SF Building Employment Density Factor (Per Employee)	236 SF		380 SF		760 SF		3,000 SF		300 SF		1.25 Rm	
	Number of Employees	423		263		131		33		333		133	
2.	Employees living in Sacramento County (89%)	376		234		116		29		296		118	
3.	Adjustment for Labor Force Participation Increase (15%)	320		199		99		25		252		100	
4.	Adjustment for Number of Households (1.35 employees/household)	237		147		73		18		186		74	
5.	Employment Occupational Distribution	%	#	%	#	%	#	%	#	%	#	%	#
	Professional/Technical	46	107	50%	74	21%	15	17%	3	20%	37	13%	10
	Managers	–		–		–		–		–		–	
	Clerical	46%	109	17%	25	12%	9	23%	4	10%	19	13%	10
	Craft	–		11%	16	21%	15	9%	2	8%	15	6%	4
	Operator	–		20%	29	40%	29	22%	4	3%	6	–	–
	Laborer	–		2%	3	6%	5	29%	5	7%	13	–	–
	Sales/Service	8%	19	–						52%	96	68%	50
		100%	237	100%	147	100%	73	100%	18	100%	186	100%	74

Table 1 (CONT.)

COMMERCIAL & INDUSTRIAL BUILDING TYPES VERY LOW INCOME HOUSING NEXUS ANALYSIS

	STEPS	OFFICE		INDUSTRIAL R&D		INDUSTRIAL MANUFACTURING		INDUSTRIAL WAREHOUSING		RETAIL		HOTEL	
6.	Households Earning Less Than $17,080	%	#	%	#	%	#	%	#	%	#	%	#
	Professional/Tech./ Manager	6%	7	6%	4	6%	1	6%		6%	2	6%	1
	Clerical	56%	61	56%	14	56%	5	56%	2	56%	11	56%	6
	Craft	–		35%	6	35%	5	35%	1	35%	5	35%	1
	Operator	–		75%	22	75%	20	75%	3	75%	5	75%	
	Laborer	–		90%	3	90%	5	90%	5	90%	12	90%	
	Sales/Service	–		–		–		–		90%	86	90%	45
			68		46		36		11		121		53
7/8.	Households Meeting Criteria												
	Professional/Technical/ Managers	1.6		1.1		.2		.1		.6		.2	
	Clerical	23.0		5.2		1.9		.9		4.0		2.1	
	Craft	–		2.1		1.9		.3		1.9		.5	
	Operator	–		8.4		8.4		1.2		1.7		–	
	Laborer	–		1.1		1.9		1.9		4.9		–	
	Sales/Service	–		–		–		–		–		17.5	
		24.6		17.9		14.3		4.4		45.0		20.3	
9.	Adjusted to Eliminate Multiple Earner Households Earning in Excess of $17,000	18.4		13.4		10.7		3.3		33.7		15.2	

Source: Keyser Marston Associates, Inc.
November 1987

Table 2

VERY LOW INCOME HOUSING COST & COST OF SUBSIDY PORTION PE

(SACRAMENTO CITY AND COUNTY)

		OFFICE	R&D
1.	Very Low-Income Households Employed Per 100,000 Sq.Ft. Development	18.4	13.4
2.	Cost of Housing @ $36,000/unit	$662,400	$482,400
3.	Cost of Housing Per Sq.Ft. Bldg. Area (Line 2, – 100,000 sq.ft.) i.e. Nexus Amount	$6.62	$4.82
4.	Cost of Housing Subsidy Portion @ $12,000/Unit	$220,800	$160,800
5.	Cost of Housing Subsidy Per Sq.Ft. Bldg. Area (Line 4 – 100,000 sq.ft.) i.e. Nexus Amount	$2.20	$1.61

In 1987 Dollars

Source: Keyser Marston Associates, Inc.
September, 1987

PER SQ.FT. BUILDING AREA

MFG.	WAREH.	RETAIL	HOTEL
10.7	3.3	33.7	15.2
$385,200	$118,800	$1,213,200	$547,200
$3.85	$1.28	$12.13	$5.47
$128,400	$39,600	$404,400	$182,400
$1.28	$0.39	$4.04	$1.82

Table 3

REVENUE GENERATING POTENTIAL FEES AT NEXUS AMOUNT

(SACRAMENTO CITY & COUNTY)

		OFFICE	R&D	MFG.	WAREH.	RETAIL	HOTEL	OTHER	TOTAL
1.	Total Housing Cost Per Sq.Ft. At Nexus Amount (Table 1, Line 3)	$6.62	$4.82	$3.85	$1.18	$12.13	$5.47	NA	NA
2.	Annual Average Sq.Ft. Construction 1984-86 Average (City Analysis, Table A-1)	2,203,217	235,023	470,046	1,645,162	1,487,687	397,975	283,810	5.7M
3.	Total Revenue	$7,965,300	$1,312,800	$1,809,700	$1,941,300	$18,045,600	$2,176,900	NA	$33.2M
4.	Housing Subsidy Portion Per Sq. Ft. at Nexus Amount (Table 1, Line 5)	$2.20	$1.61	$1.28	$0.39	$4.04	$1.82	NA	NA
5.	Total Revenue (Based on Line 4 above)	$2,647,100	$378,400	$601,700	$641,600	$6,010,300	$724,300	NA	$11.03M

In 1987 dollars.

Source: Keyser Marston Associates, Inc.
September, 1987

Table 4

IMPACT ON CONSTRUCTION COST EVALUATION OF FEES AT SUBSIDY NEXUS AMOUNT

(SACRAMENTO CITY & COUNTY)

		OFFICE	R&D	MFG.	WAREH.	RETAIL	HOTEL
1.	Subsidy Portion Nexus Amount (Table 1, Line 5)	$2.20	$1.65	$1.28	$0.39	$4.04	$1.82
2.	Construction Cost Per Sq.Ft. (City Analysis Table 1-A)	$60	$45	$40	$25	$38	$60
3.	% Increase on Average	3.6%	3.7%	3.2%	1.5%	10.6%	3.0%
4.	Range to Reflect Variations within Category for Different Construction Types	1%-5%	3%-5%	2%-4%	1%-2%	5%-12%	2%-4%

In 1987 Dollars.

Source: Keyser Marston Associates, Inc.
September, 1987

Table 5

VERY LOW INCOME HOUSING TRUST FUND NEXUS FEE ALTERNATIVES

(SACRAMENTO CITY AND COUNTY)

	OFFICE	R&D	MFG.	WAREH.	RETAIL	HOTEL	OTHER	TOTAL
#1 PURE NEXUS SUBSIDY FEE @ 50% ACTUAL								
Nexus Fee Per Sq.Ft. (50% x Table 1, Line 5)	$1.10	$0.80	$0.64	$0.195	$2.02	$0.915	NA	NA
Revenue Raised	$1,323,600	$188,000	$300,800	$320,800	$3,005,100	$362,200	NA	$5.50M
Impact Range on Construction Cost	1%-3%	1%-3%	1%-2%	0.5%-1%	3%-6%	1%-2%	NA	NA
Variations: Exemptions for Minimum Size Buildings								
#2 BLENDED APPROACH – PER SQ.FT. FEE								
Nexus Fee Per Sq.Ft.	$1.00	$.80	$0.50	$0.25	$0.75	$.90	$0.50	$0.73
Revenue Raised	$1,203,200	$188,000	$235,000	$411,300	$1,115,800	$358,200	$141,900	$3.65M
Impact Range on Construction Cost	1%-3%	2%-3%	1%-3%	1%-1.5%	1.5%-3%	1%-3%	1%-3%	NA
Variations: Differentiated Fee by Construction Type Exemptions for Minimum Size Buildings								
#2 BLENDED APPROACH VARIATION – FEE ON VALUATION								
Nexus Fee on Valuation	$.015	$.015	$.013	$.012	$.018	$.014	$0.15	$0.14
Revenue Raised	$1,082,900	$158,600	$244,400	$493,500	$1,017,600	$334,300	$191,800	$3.52M
Impact Range on Construction Cost	1.5%	1.5%	1.3%	1.2%	1.8%	1.4%	1.5%	1.4%
Variations: Exemptions for Minimum Size Buildings								

Source: Keyser Marston Associates, Inc.
September, 1987

TABLE A-1

COMMERCIAL AND INDUSTRIAL CONSTRUCTION PERMIT ACTIVITY

SACRAMENTO CITY AND COUNTY

CONSTRUCTION VALUE	I_T 84/85	I_T 85/86	84-85 average	Average cost per sq. ft.	85/86 Estimated sq. ft.
New Construction					
Motels, hotels	40,011,405	7,745,623	23,878,514	60	397,975
illegible, assembly	2,798,566	10,339,946	6,569,256	50	131,385
Industrial, warehousing	69,999,592	71,014,340	70,506,966	30	2,350,232
Service stations	1,593,916	3,441,031	2,517,474	42	59,940
Offices, banks	84,109,814	60,276,175	72,192,995	60	1,203,217
Retail	52,416,155	60,648,083	56,532,119	38	1,487,687
Other non-residential	3,678,379	3,720,439	3,699,409	40	92,485
Subtotal	254,607,827	217,185,637	235,896,732		5,722,922
Additions, alterations, repairs	90,771,472	103,596,148	97,183,810		
Total Commercial Value	345,379,299	320,781,785	333,080,542		

ILLUSTRATIVE FEE SCHEDULES

Approximate fee to raise:	1,000,000	$0.17 per square foot of '84-'86 avg. 0.42% of new construction value
	3,000,000	$0.52 per square foot of '84-'86 avg. 1.27% of new construction value
	6,000,000	$1.05 per square foot of '84-'86 avg. 2.54% of new construction value

SHRA staff, August 1987

*Industrial	Sq. Ft. Distribution		Valuation Distribution	
	%		Per Sq.Ft.	
R&D	10%	235,023	45	10,576.1
Manufacturing	20%	470,046	40	18,801.8
Warehousing	70%	1,645,162	25	41,129.1
Total		2,350,232	$30	$70,507.0

Footnote: Keyser Marston Associates, Inc.

SACRAMENTO HOUSING
NEXUS ANALYSIS
METHODOLOGY AND DOCUMENTATION

STEP 1: ESTIMATE OF TOTAL NEW EMPLOYEES

The estimate of the number of employees is derived based on an employment density factor for each land use. As shown below, the gross building area is divided by the employment density factor to calculate employment.

Gross Building Area	-	Employment Density Factor	=	Employment

The employment density factor is different for each land use and can widely vary within each land use depending on land use types. Densities in manufacturing, for example, vary within a huge range. Other land uses are more constant. Employment density factors in this analysis are based on KMA's experience in working in the Sacramento market and on local published data.

The office employment density factor is estimated at 236 square feet per employee. This estimate assumes a 5% office vacancy factor. The employment density factor for retail is 300 square feet per employee and for hotel 1.25 rooms per employee. These density factors are based on typical tenant types in the Sacramento market.

For industrial employment density factors, KMA has in part relied on information published by the Sacramento County Planning Department. The County provides data on the number of jobs per acre. Research and development, manufacturing, and warehousing and distribution jobs per acre are estimated in the Sacramento region at

40, 20 and 7.5, respectively. KMA has estimated employment density factors for the these three industrial land uses using these data along with average building area per acre ratios or F.A.R.'s. The building area per acre ratios, which based on typical industry standards, are .35 for both research and development and manufacturing and .50 for warehousing and distribution.

The employment density factors used in this analysis are the following:

Office	236/SF
Research and Development	380/SF
Manufacturing	765/SF
Warehousing and Distribution	3000/SF
Retail	300/SF
Hotel	1.25/Rm

Data Source: "The Sacramento Region in 1990 Economic Growth and the Demand for Industrial Land", Sacramento County Planning and Community Development Department, 1982.

STEP 2: ESTIMATE OF EMPLOYEES LIVING IN SACRAMENTO COUNTY

This step estimates the number of employees residing in Sacramento County.

Employment	x Percentage of Workers Residing in Sacramento County	=	Employees Residing in Sacramento Co.

The percentage of Sacramento workers residing in Sacramento County is estimated based on 1980 Census data. The census reports there are 318,100 workers over sixteen

years of age working in Sacramento County of which 283,100 also live in the County. This indicates 89% of the people who work in the County also resides in the County. This estimate is an average across all occupational groups and land uses. Examining selected occupations indicates that this average can range plus or minus 5%. For purposes of our analysis, this range is viewed as statistically insignificant.

Data Source: "1980 Census of Population, Journey to Work: Characteristics of Workers in Metropolitan Areas", U.S. Department of Commerce, Section 3, pgs. 301-302.

STEP 3: ESTIMATE OF INCREASED LABOR FORCE PARTICIPATION

This step eliminates employees that enter the labor force as a result of increased participation by existing Sacramento residents. Women, who were not formerly in the labor force, going to work accounts for the vast majority of increased participation. Based on Economic Development Department (EDD) and Sacramento County Planning Department data, KMA estimates 18% of all new jobs between 1970 and 1980 in the Sacramento Metropolitan area were filled due to increased labor force participation by Sacramento residents. This percentage is calculated based on County data that indicated approximately 27,000 jobs between 1970 and 1980 in the Sacramento region were filled due to increased labor force participation while during the same period employment grew by 150,000 jobs.

In our judgement, this percentage should decline over the next decade as fewer second wage earners in households enter the labor force. For purposes of this analysis, we estimate 15% of all new jobs will be filled by residents in existing Sacramento households. Conversely, 85% of the new jobs will be filled by residents that represent new household formations.

Employees Residing in Sacramento Co.	x	% of jobs filled by new households	=	Employees In New Households

Data Source: "The Sacramento Region in 1990, Economic Growth and the Demand for Industrial Land," Sacramento County Planning and Community Development Department, Appendix 3.

State of California, Economic Development Department, Employment figures for the Sacramento SMSA for 1970 and 1980.

STEP 4: ESTIMATE OF THE NUMBER OF HOUSEHOLDS

This step estimates the number of households represented by a given number of employees. The number of households needs to be estimated since housing assistance is based on household income and household size. The Sacramento Housing and Redevelopment Agency estimates there are 1.35 wage earners per non-elderly household. Using this factor the number of households can be calculated.

Employees In New Households	Average Number of Workers per Household	=	New Households

Data Source: Sacramento Housing and Redevelopment Agency

STEP 5: BREAKDOWN OF HOUSEHOLDS BY OCCUPATION

This step divides households by occupational groupings for each land use. For purposes of this analysis, we have relied on the occupational groupings defined by the State of California Employment Development Department. Occupational groupings include Professional/Technical/Managerial, Clerical, Craft/Kindred, Sales, Service, Operative and Laborer. For each land use category, such as office, the total number of households identified in Step 4 are disaggregated into occupation categories. In this step, we have relied on data for the Sacramento region whenever possible, but for some land uses we have turned to national census data to complement local data.

Our primary source for office and industrial land uses was the industry and occupation matrix prepared by EDD. For retail and hotel we relied on the occupation industrial survey in the 1980 U.S. Census.

New Households	x	Percentage of Households in each Occupation Category	=	New Households in each Occupation Category

Data Source: "1980-1985 Projections of Employment by Industry and Occupation", State of California Employment Development Department, Table 3.3.

"1980 Census of Population; Occupation by Industry Survey", U.S. Department of Commerce, Volume 2.

STEP 6: ESTIMATE OF EMPLOYEES MEETING VERY LOW INCOME DEFINITION

The number of households in each occupation category that meet the very low income criteria are estimated in Step 6. To accomplish this step, KMA first reviewed available wage survey data collected by the U.S. Department of Labor and the State of California Employment Development Department.

Overall, these sources did not provide enough comprehensive and detailed data for our needs; in the majority of cases data was available for only a select number of job types. As a result, we had to make judgements based on extrapolation of available data to estimate the percentage of households that have a wage earner making less than $17,050. This income level is set by HUD as the upper limit to qualify a household's income as very low income. This does not necessarily mean the household qualifies for assistance since the household must also meet household size criteria.

The most comprehensive wage data was found for office workers, particularly for clerical and professional/technical occupations. This survey data was accumulated by the

U.S. Department of Labor which conducts periodic surveys of occupational earnings for selected occupations in the Sacramento metropolitan area.

KMA's analysis of this survey data indicated that 56% of clerical office workers and 6% of professional/technical office workers earn less than $17,050. The employees in the professional/technical occupations earning less than $17,000 are in computer data entry jobs. Available wage data for other land uses and related occupational groups was less complete and provided data for only select job types, such as welder and cashier. KMA had to therefore make estimates of income distribution by occupation.

To estimate the percentage of households earning less than $17,050 in the craft/kindred, service, operative and laborer occupations, we have used the clerical wage data as a benchmark and have made adjustments relying on available wage data for selected job types in each of the occupational categories. This methodology introduces a potential source of error since the estimate of households earning less than $17,050 for each of these occupations is not based on a representative range of job types but rather on specific jobs types which may not adequately reflect the range of salaries in an occupation category. Additional research should be undertaken to see if more comprehensive wage data is available.

The percent of households earning less than $17,050 for each occupation are shown in the table on the following page. These percentages were applied to all six land uses.

	% Employee Households Earning Less Than $17,000
Professional/Technical/ Managerial	6%
Clerical	56%
Crafts/Kindred	35%
Operative	75%
Laborers	90%
Service	90%

The next step estimates the number of very low income households in each of the five very low income subgroups defined by HUD. For this step, we have again relied on clerical wage data. As previously discussed, this data is the most comprehensive and thus is utilized to estimate the number of very low income households in each of HUD's income subgroups. This is done for the crafts/kindred, operative, service and laborer occupational categories and applies to all land use categories. Table A-1 presents the distribution of households that fall in to these five income subgroups.

By using the clerical income distribution to estimate the number of households in each of HUD's five income subgroups, our estimates for the four occupational categories will either over or underestimate the number of households in each subgroup. Additional research is needed to obtain more comprehensive and detailed wage data for each occupation category.

Data Source: "Area Wage Survey, Sacramento, California Metropolitan Area", U.S. Department of Labor, December 1986.

"Sacramento Region Business Profile, Greater Sacramento Area", The Sacramento Area Commerce and Trade Organization, 1986.

"Annual Planning Information; Sacramento", State of California Employment Development Department, May, 1987.

STEP 7: ESTIMATE OF HOUSEHOLD SIZE DISTRIBUTION

HUD's criteria for assistance is dependent on a household meeting a combination of income and household size requirements. Step 7 estimates the number of households in each household size category ranging from one person per household to five persons or more per household.

Household size varies by income and age, so we utilized U.S. Census on data for non-elderly households with an income less than $15,000 in 1979 dollars. This income level is close enough to approximate HUD's $17,050 income level in 1987.

The following chart is a percentage breakdown of households under $17,050 by size:

Low Income Household Size	Percent
1	36%
2	28%
3	18%
4	11%
5 or more	7%

Date Source: "1980 Census of Population, Detailed Population Characteristics, California", U.S. Department of Commerce, Section 3, Page 6-2394.

STEP 8: ESTIMATE OF VERY LOW INCOME HOUSEHOLDS THAT MEET INCOME AND SIZE CRITERIA

This step calculates the number of households that meet HUD's very low income assistance criteria. Using the matrix shown on Table A-2, a probability factor is calculated for each of the five HUD income subgroups, such as for example households earning less than $12,650 with a household size of two. To determine the probability factor for each occupation category the five probability factors calculated for each HUD level are totalled. This number represents the probability that new households in a given occupation category will meet both income and household size criteria established by HUD. The probability factors for each occupation are presented below:

	% of Households that Meet HUD Criteria
Profession/Technical/ Managers	1.5%
Clerical	21.3%
Craft/Kindred	13.0%
Operative	29.0%
Laborer	38.0%
Service	35.0%

To determine the number of households that qualify for assistance the probability factors shown above are multiplied by the number of households by occupation estimated in Step 5. This is done for each land use category.

STEP 9: ADJUSTMENT TO ELIMINATE MOST MULTIPLE EARNER HOUSEHOLDS

This last step makes an adjustment to eliminate most of the households that have two or more earners such that the incomes in combination make the households no longer qualify as very low income. The U.S. Census tells us that overall 40% of the households have one wage earner but in the under $15,000 households, 70% have only one wage earner. Recognizing that there likely a significant share of multiple wage earner households that still do qualify (particularly among minority households where families may be large and skill levels low), we made the judgement to use a 75% factor.

This final adjustment produces the number of very low income households directly associated with the construction of 100,000 sq.ft. of building area by type.

Number of Households Requiring Assistance	x	% Adjustment to Eliminate Multiple Earner Households	=	Adjusted Number of Households Requiring Assistance

Data Source: "1980 Census of Population, Detailed Population Characteristics, California", U.S. Department of Commerce.

Table 1-A

HOUSEHOLD DISTRIBUTION

HUD's Income Categories	Professional/ Technical	Clerical	Craft	Operator	Laborer	Service
Less than $11,050	.2%	3%	2%	4%	5%	5%
Less than $12,650	1%	18%	11%	24%	29%	29%
Less than $14,200	2%	37%	23%	50%	60%	60%
Less than $15,800	4%	44%	27%	59%	70%	70%
Less than $17,050	6%	56%	35%	75%	90%	90%

Source: Keyser Marston Associates, Inc.
September, 1987

Table 2-A

VERY LOW INCOME HOUSING ASSISTANCE CLERICAL OCCUPATION

Household Size		DISTRIBUTION BY INCOME						
		Less Than $11,050	Less Than $12,650	Less Than $14,200	Less Than $15,800	Less Than $17,050	Total	
		(2.8%)	(18%)	(37.2%)	(43.8%)	(55.8%)		
Size	Distribution							
1	(36%)	1% (1)					1.0%	
2	(28%)		5% (2)				5.0%	
3	(18%)			6.7% (2)			6.7%	
4	(11%)				4.8% (2)		4.8%	
5	(7%)					3.9% (2)	3.9%	
Total	100%						21.4%	(3)

Table 2-A (Continued)

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(1) This number indicates 1% of all one person clerical households will earn less than $11,050 and thus qualify for very low income assistance. This percentage is calculated by multiplying the percentage of one person households (36%) by the percentage of households earning less than $11,050 (2.8%).
(2) Calculated using the same approach as in footnote one.
(3) Represents the percentage of clerical households that will meet HUD's very low income criteria.

Source: Keyser Marston Associates, Inc.
August, 1987

APPENDIX F

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

COMMERICAL BUILDERS OF NORTHERN CALIFORNIA, AND ITS AFFECTED MEMBERS, Plaintiffs and Petitioners, v. CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20, inclusive, Defendants and Respondents.	Case No. CIV 89-638 EJG DECLARATION OF DAVID WADE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT DATE: 9/8/89 TIME: 1:45 p.m. COURTROOM: No. 2

I, DAVID WADE, declare:

1. I am a principal and owner of Wade Associates, a consulting firm specializing in urban planning, including particular aspects of urban development involving planning, design and economics. I hold a B.S. degree in City and Regional Planning from California Polytechnic, San Luis Obispo, and a masters degree in Architecture and Urban Planning from U.C.L.A. (1978). I have been the principal planner and designer on several large area master plans ranging from 750 to 3,500 acres in size. Recent projects include the Southeast Roseville Specific Plan, the Northwest Roseville Specific Plan, the North Central Roseville Specific Plan, the Northwest El Dorado Hills and El Dorado Hills Specific Plans, (El Dorado County), and Stanford Ranch in Rocklin. I prepared the companion Design Guidelines for many of these master plans. I was part of the multi-disciplinary team that developed the planning and cost estimates for the Laguna Community Public Facilities Master Plan and the Antelope Community Public Facilities Master Plan. In both projects, I prepared the landuse analysis and the service projections and cost estimates for the "soft" public service components. I also prepared master facilities plans for several school districts and park districts and prepared fiscal impact analysis on several development projects. I served as Assistant Executive Officer, Sacramento County Local Agency Formation Commission, from 1978--1981, and as Assistant City Planner of the City of Novato from 1973—1976. I am past Director of the Sacramento Valley Section of the American Planning Association and a charter member of the American Institute of Certified Planners.

2. During the course of the City of Sacramento's consideration of a development fee to be imposed on non-residential construction to provide a trust fund for the construction of low income housing, I was hired by the Commercial Builder's Council of the Building Industry Association of Superior California, Inc., to study the memorandum prepared by Keyser Marston and Associates, Inc. ("KMA") in November, 1987. The memorandum, referred to hereinafter as the "KMA study, was described as a summary of a "preliminary analysis of the linkage between the development of various types of commercial and industrial buildings and very low income housing needs."

3. In reviewing the KMA study, I concluded that the study is a series of estimates and assumptions used to define a complex set of interactions. It does not include sufficient information to draw the conclusions made in the study. The nexus between job information and housing demand among low income groups is highly speculative. Consequently, the low income housing development fee is not substantiated on the basis of the analysis provided by KMA in its study.

4. Employers are attracted to an area by the availability of the suitable work force. Research on site location decisions for firms considering the Sacramento region indicate that the availability of the skill and labor forces rank as very important by 64% of the 128 respondents to the detailed survey conducted for the City of Sacramento. The same survey indicated that the potential employers rated housing availability and costs as one of the six best features of the Sacramento region compared to other potential locations in the United States.

5. A fundamental presumption underlying the development fee is that the creation of new jobs in Sacramento will induce low income households to relocate here to fill the employment opportunities. In fact, however, the availability of relatively low cost housing may be a far more significant factor than job availability. Households decide to relocate on the basis of economic factors including employment opportunity and housing cost. The employment opportunities for low skilled workers is likely to be greater in larger metropolitan areas than in Sacramento simply due to the larger employment base. Moreover, the income paid for a low level job is likely to be roughly comparable in any region in California although the housing prices will vary greatly. If an individual in another region already has housing, but is seeking a job at a relatively low skill level, the probability is that they will seek employment in their home region. However, if the opportunity arises to improve their quality of life by spending less for comparable housing in another location, then there will be an inducement to move. For very low income households, the availability of housing at lower cost may be an overriding determination in relocation decisions. This conclusion is consistent with a study of employment inmigration is South Placer County made by Anna Marie Roberts, *"Migration and Housing Demand in South Placer County"*, (1984). The study is based on detailed surveys of workers in all economic sectors conducted biannually since 1981 by the City of Roseville, in cooperation with the Placer County Manufacturers' Association and other jurisdictions in Placer County. Roberts found that first-wave immigrants to the South Placer Region tend to be

the higher-paid workers with special skills drawn by relatively higher paying positions. Again, the relative low cost of housing in the Sacramento region is often cited as a reason for relocating. Roberts found that the lower paying jobs were filled by workers who already live in the area and that migrants are usually married men with higher than average income and the sole wage earner in their household. Migrants are most frequently employed in professional and managerial positions representing a much larger proportion of the employees in these positions.

6. The KMA Study is structured on the implicit assumption that all employees are new employees to the County and that, "if the employees of this (new) building have relocated from other buildings, they will have vacated space somewhere else in the County and somewhere in the chain new employees will have come to Sacramento County to work." There is no evidence offered in the KMA study for this assumption regarding the ultimate occupancy of space in the County. The key point in this assumption is that the acknowledgement that any supposed linkage between the development of commercial buildings and housing need is very *indirect*. In the foregoing example, the occupants of new space incur a fee from which they derive only a remote benefit of increased low income housing supply. In contrast, businesses which occupy older space not affected by the fee will escape making any contribution to the community benefit of an expanded low income housing supply. Thus, a significant inequity is inherent in the proposed fee because the explicit purpose of the nexus analysis is to establish a precise fee on new construction based on a

presumed impact on the housing needs of the community. A limited telephone survey of commercial leasing brokers conducted by my firm indicated that much of the new space in Sacramento has been occupied by businesses already within the Sacramento region. In such case, businesses that already are part of the community, and which are presumably staffed by area residents, would be paying a fee that is disproportionate to the presumed benefit for that project.

7. The KMA study provides an adjustment for the presumption that all new workers in Sacramento County will also reside at the County. The study assumes that the percentage of workers who reside in the County is comparable to the percentage that was measured in the 1980 Census. The report notes that "on a preliminary judgmental basis, no updating was deemed necessary given the substantial percentage that both residential and non-residential development that is occurring in Sacramento County versus the other counties in the metropolitan area." In fact, substantial growth has occurred in neighboring counties and may well modify the distribution of jobs and housing within the region. South Placer County and the west slope of El Dorado County have experienced substantial growth within the last decade and all indications are that this growth will be the major thrust of growth within the region. The new development has, thus far, been primarily residential. Roseville and Stanford Ranch have attracted a significant number of notable employers, such as Hewlett Packard, NEC, Herman Miller, Ace Hardware, and 3-M, among others, but these employers have thus far generated a relatively small number of jobs. In contrast, the residential areas have

expanded rapidly with major new subdivisions in Roseville, Rocklin and Lincoln. The distribution of jobs and housing within the Sacramento region that existed in 1979 is an extremely questionable basis for calculating the fees set forth in the KMA study. The growth and employment opportunities in the neighboring counties are significant factors in the overall regional job/housing balance and distribution of workers and employment. The nexus study appears to significantly overstate the number of employees residing in Sacramento County, and would undoubtedly be even less accurate with respect to the City of Sacramento.

8. The KMA study utilizes the labor force participation rate as a proxy for estimating the level of new employment among current low income residents. The KMA study assumes that all employment categories and all economic sectors would absorb local employment by a uniform 15%, and there is no attempt to recognize what proportion of the expansion may be concentrated in one income group. The use of a uniform percentage of increase in labor force participation distorts the actual effect of new employment. The increase of labor force participation has come from second wage earners within a household, typically, but not exclusively, from the wife of a primary wage earner. Over the decades 1950 through 1980, the number of working wives increased by 276.1% nationally; the husband equivalent expanded by only 32.2%. The projection of woman's participation in the labor force through 1990 indicates that this trend will slow, but will continue to be significant.

9. The detailed components of the KMA study dealing with allocation of low income by household and

occupation are based entirely on assumptions and partial information. The low income group is distributed according to estimates and assumptions based on incomplete data. The number of employees within KMA's very low income definition is only a "judgment based on extrapolation of available data to estimate the percentage of households that have a wage earner making less than $17,050." The KMA study relies heavily on speculative relationships and assumptions that cannot be verified empirically, and are useful only for general planning purposes. The calculation does not, however, demonstrate a direct causal relationship between commercial real estate development and low income housing needs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Roseville, California, on this 10th day of August, 1989.

/s/ David Wade
DAVID WADE